COMPETITION AND BANKRUPTCY IN THE AIRLINE INDUSTRY: THE PROPOSED MERGER OF AMERICAN AIRLINES AND US AIRWAYS

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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MATERIAL SUBMITTED FOR THE HEARING RECORD

COMPETITION AND BANKRUPTCY IN THE AIRLINE INDUSTRY: THE PROPOSED MERGER OF AMERICAN AIRLINES AND US AIRWAYS

TUESDAY, FEBRUARY 26, 2013

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:02 a.m., in room 2141, Rayburn Office Building, the Honorable Spencer Bachus (Chairman of the Subcommittee) presiding.

Present: Representatives Bachus, Goodlatte, Farenthold, Marino, Holding, Collins, Rothfus, Cohen, Conyers, Johnson, Delbene, Garcia, and Jeffries.

Staff present: (Majority) John Hilton, Counsel; Ashley Lewis, Clerk; (Minority) Perry Apelbaum, Staff Director & Chief Counsel; James Park, Minority Counsel; Veronica Eligan, Professional Staff Member.

Mr. BACHUS. Good morning. The Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law is in session.

By way of introduction, this is the first hearing of the year for the Subcommittee. Chairman Goodlatte has given me the great privilege of Chairing this Subcommittee. And under its antitrust jurisdiction, the Judiciary Committee has the duty to examine the competitive impacts of significant transactions on the marketplace. It is responsibility that I take very seriously from the standpoint of consumer choice and the functioning of free markets.

Today's hearing is specifically to examine the proposed merger between American Airlines and US Airways. The resulting airline with a 24 percent market share would become the largest of what might be called the four legacy U.S. carriers. The Department of Justice will conduct a detailed review of the proposed merger under the Hart-Scott-Rodino Act. There will be several other layers of scrutiny both here and in the U.S. and in Europe.

This hearing is intended to provide information to the public, not to state a Subcommittee policy position, although I think there obviously will be independent—I mean, each Member will have independent opinions, and obviously are free to state those.

The airline has been in a state of near constant change and innovation since Federal deregulation in 1978. We have a marketplace or we have a marketplace in which familiar names that most of us grew up with, like Pan Am, TWA if you traveled overseas, or in the south, Eastern, and Republic, and Southern no longer exist. They have either merged, bankrupted, or gone out of existence. But we have also seen the emergence of new carriers with different business models, like Southwest and Virgin.

The embracing of electronic technology has created online booking and instant price comparison tools that have greatly benefitted travel by expanding choice. That is the competitive free enterprise system at work and is the cornerstone of our economy. However, there are questions that naturally arise during airline mergers and issues that have confronted some of the mergers. And today's hearing offers an appropriate forum to address those.

The issue that many consumers would be interested in knowing about, to the extent it can be answered, is the potential impact on their cost of flying. Service routes are also a concern as are the levels of service that will be offered post-merger at the current hubs of American and US Airways. From a broad competitive perspective, there is the issue of airline market share at individual airports and the overall market share held by major carriers and the prospects and implications of future consolidation.

Our goal today is to facilitate discussion just as consumers are served by clear and transparent pricing, so when they shop online for a plane ticket they are served by good information by comparing different points of views.

We welcome all our witnesses and look forward to your testimony.

I now recognize the Ranking Member for his opening statement.

Mr. CONYERS. Thank you.

Mr. BACHUS. Either one, whatever.

Mr. COHEN. I yield to Mr. Conyers. I always yield to Mr. Conyers.

Mr. BACHUS. Thank you.

Mr. COHEN. An honor to serve with Mr. Conyers. He is Mr. Rosa Parks.

Mr. BACHUS. I have served with him, too, and I would recognize him first.

Mr. CONYERS. Well, I thank you both for your generosity. We come here today looking at a very important part of the economic system that has guided this country. And I have always worried during previous airline mergers, and without prejudging the merits of the ones that brings us here today.

We should recall that both parties to this merger bear a high burden in demonstrating that further consolidation in the airline industry is warranted. One of the arguments advanced in favor of some past mergers—Delta, Northwest, United, Continental—was the claim that there was too much capacity in the industry, which led to excessively low fares that prevented carriers, particularly so-called legacy carriers with their higher costs, from earning a sufficient income.

We ought to consider whether this is still the case. While American is in bankruptcy—pardon me—it is poised to successfully reor-

ganize with billions of dollars in cash and reduce costs as a result of reorganization. Moreover, US Airways posted record profits. These facts suggest that both airlines are, in fact, perfectly capable of surviving, even thriving, as stand-alone companies.

Industry consolidation may benefit the airlines that remain by giving them power to raise fares and fees, but it comes with costs to the consumer. And as has been noted, it may result in higher fares, fewer consumer choices, particularly in hubs and city fares where two carriers overlap. In retrospective studies of the effects of Delta, Northwest, United, Continental mergers, it suggests that, in fact, fares did rise on some routes where the two merger partners used to compete.

Given the size of the big three, legacy airlines that would remain after the merger, it is not entirely unreasonable to suggest that they would have even greater power to tacitly agree to raise prices, undermining price competition and harming consumers in the process. Indeed, if American and US Airways were to merge, more than 70 percent, and by some estimates as high as 86 percent, of the domestic airline industry would be controlled by just four airlines. I fear that the flying public will see relatively few benefits while bearing much of the costs of this potential merger.

Another related issue is whether the low-cost carriers can continue to provide effective competitive pressure on what will be the big three legacy airlines should this merger occur. One of the arguments I hear most often in the prior airline consolidations was that the industry would remain very competitive after consolidation because the competition against large carriers, which were able to offer lower fares because of their lower operating costs.

But of the LLCs, however, only Southwest is large enough to compete nationwide against the large legacy carriers. And there is reason to wonder whether Southwest will continue to play the traditional role of an LLC in competing on ticket prices given that it is now part of the big airline club.

And finally, we must consider what impact this will have on workers at the two carriers. In stark contrast to previous airline mergers, the unions representing American and US Airways, with the exception of the machinists, have come out in public support of this merger. And the machinists have said that they could support it, but only after US Airways renews its contract with their own members first. Indeed, America's unions have been instrumental in pushing for this merger.

And so I will submit the rest of my statement, Mr. Chairman, and thank you for your generosity.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Ranking Member, Committee on the Judiciary, and Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

This first hearing of the Subcommittee on Regulatory Reform, Commercial and Antitrust Law in the 113th Congress is as good a time as any to remind ourselves that the main purpose of antitrust law is to ensure that business does not behave in ways that injures markets, and, ultimately, consumers.

In the context of mergers, this means that any transaction that would result in a firm having market power—that is, the ability to raise prices or otherwise harm consumers without losing their business—is contrary to basic antitrust policy.

So it is hardly a radical notion that we ought to be suspicious when there has been a rapid succession of mergers in a given industry.

In my view, the very fact that many industries end up being dominated by just a handful of very large firms should disturb us, as basic economics and common sense should tell us that a few dominant firms will raise prices on consumers and offer them suboptimal products or services in exchange.

Yet, over the last generation, we have seen a wave of mergers in industry after industry, including among large, direct competitors. Just a few examples include the Whirlpool-Maytag, AT&T-BellSouth, AOL-Time Warner, and JPMorganChase-BankOne. In the banking industry alone there have been 47 mergers since 2001.

And during this time, merger review and antitrust enforcement did not, in my view, account sufficiently for consumers' interests.

This hands-off approach to antitrust merger enforcement reflected the view that corporate power should trump other interests, including the public interest. For a long time, the trend in antitrust law was against the American consumer.

While I am hopeful that the nearly blind acceptance of the validity of mergers is coming to an end, I briefly review this history of mergers and antitrust because I wanted to place our consideration of the proposed merger of American Airlines and US Airways in proper context.

Nearly five years ago, I chaired a hearing on the then-proposed merger of Delta Air Lines and Northwest Airlines before what was then the Task Force on Competition Policy and Antitrust Laws.

I noted during that hearing that the deal raised several potential concerns, including that in the wake of several airline mergers up to that time, consumers had been prejudiced as delays increased, service declined, and fares rose.

I also expressed concern that should the Delta-Northwest transaction be approved, it would spark a cascade of other mergers, such as between United Airlines and Continental Airlines and between American Airlines and US Airways, leading potentially to an unwarranted level of concentration in the airline industry.

It appears that I was right to worry. In fact, two years after that hearing, United and Continental did merge, and today we have for our consideration the proposed merger of American Airlines and US Airways.

While I do not wish to pre-judge the merits of an American-US Airways merger, there are several issues that the Department of Justice and other regulators should keep in mind when reviewing this deal.

To begin with, the parties to the merger bear a high burden in demonstrating that further consolidation in the airline industry is warranted.

One of the arguments advanced in favor of the Delta-Northwest and United-Continental mergers was the claim that there was too much capacity in the industry, which led to excessively low fares that prevented carriers—and particularly the so-called "legacy" carriers, with their higher costs—from earning a sufficient income.

We ought to consider, however, whether this is still the case. While American is in bankruptcy, it is poised to successfully reorganize, with billions of dollars in cash and reduced costs as a result of its reorganization. Moreover, US Airways posted record profits last year.

These facts suggest that both airlines are, in fact, perfectly capable of surviving, and even thriving, as standalone companies.

Industry consolidation may benefit the airlines that remain by giving them the power to raise fares or fees, but it comes with costs to the consumer.

As I noted with the Delta-Northwest merger, an American-US Airways merger may result in higher fares and fewer consumer choices, particularly in hubs and city-pairs where the two carriers overlap.

And retrospective studies of the effects of the Delta-Northwest and United-Continental mergers suggest that, in fact, fares did rise on some routes where the two merger partners used to compete.

Given the size of the "Big Three" legacy airlines that would remain after the merger, it is not entirely unreasonable to think that they would have even greater power to tacitly agree to raise prices, undermining price competition, and harming consumers in the process.

Indeed, if American and US Airways were to merge, more than 70%—and, by some estimates, as much as 86%—of the domestic airline industry would be controlled by *just four airlines.*

I fear that the flying public will see relatively few benefits while bearing much of the costs of this potential merger.

Another related issue to consider is whether the low-cost carriers, or LCC's, can continue to provide effective competitive pressure on what will be the "Big Three" legacy airlines should this merger occur.

One of the arguments that I often heard in prior hearings on airline industry consolidation was that the industry would remain very competitive after consolidation because of the competition against large carriers from LCC's, which were able to offer lower fares because of their lower operating costs.

Of the LCC's, however, only Southwest is large enough to compete nationwide against the large legacy carriers.

And there is reason to wonder whether Southwest will continue to play the traditional role of an LCC in competing on ticket prices, given that it is now part of the big-airline club.

Finally, we must consider what impact will this merger will have on workers at the two carriers.

In stark contrast to previous airline mergers, the unions representing American Airlines and US Airways employees, with the exception of the International Association of Machinists and Aerospace Workers, have come out in public support of this merger, and the Machinists have said they could support it, but only after US Airways renews its contract with their members first. Indeed, American's unions have been instrumental in pushing for this merger.

The view of these unions is that a merger will strengthen the future prospects for employees, both in terms of increased compensation and long-term job security.

Nevertheless, it is difficult to ignore the possibility that at some point jobs may inevitably be lost as a result of the merger. After all, one of the rationales for merging is to cut inefficiencies and duplication, which usually translates into job losses.

Nonetheless, I do accord great weight to the word of those who actually do the work that makes both of these companies run. So I thank the unions for making their views known to us as we review this merger.

I hope that we can have a fruitful hearing so as to assess the benefits and the costs of this merger.

Mr. BACHUS. Thank you. The Chairman of the full Committee, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. I want to thank you for holding this hearing, and on an issue that is of great importance to me and to my constituents.

In a free market economy like ours, companies are generally free to organize themselves and their assets as they see fit, including by merger. There is nothing wrong per se with mergers, even if they form large companies. The preservation of free and fair competition, however, is critical to a free market. Competition spurs innovation and ensures that the market allocates resources efficiently.

It benefits consumers and fosters economic growth. Because a free market cannot flourish without competition, a merger that decreases competition can undermine a free market. Thus, antitrust laws set important limits on companies, freedom to merge with one another.

Specifically, Section 7 of the Clayton Act prohibits mergers that substantiate lessen competition or tend to create a monopoly. This is meant to strike a balance between companies' freedom to organize their affairs while preserving the competition that is essential to a healthy market.

Recently, two of the four legacy carriers in the U.S. airline industry, American Airlines, which has been in Chapter 11 bankruptcy since late 2011, and U.S. Airways announced plans to merge. The resulting entity would be called American Airlines, but would be led by U.S. Air's chief executive officer.

Pursuant to the Hart-Scott-Rodino Act, the Department of Justice must review this proposed merger to determine if it is anticompetitive. This is a highly technical inquiry, and the Department

should be guided purely by the facts and the law, not by politics or ideology.

The basic question the Department should seek to answer is, how this merger's impact on competition would affect consumer welfare. Congress has an oversight responsibility to ensure that the Department of Justice conducts its merger reviews in a thorough, fair, and reasonably prompt fashion. The Department should ask whether the merger would enable American to raise ticket prices or raise other ancillary fees or reduce services on particular routes, especially routes currently served by both airlines. It should ask whether there is sufficient competition on these routes, such as from low-cost carriers, to keep a post-merger American Airlines in competitive check. It also should ask whether post-merger a new carrier would move into a route served by American and begin to compete.

To put it mildly, the airline industry has changed a great deal since it was deregulated in 1978. New airlines with new business models have sprung up to serve consumers. Other airlines have gone bankrupt. Some of the latter have returned from bankruptcy. Others have merged, and others have failed all together.

In the last 5 years, the House Judiciary Committee has held hearings on two major airline mergers: Delta-Northwest in 2008 and United-Continental in 2010. Five major airlines—United, Delta, American, US Air, and Southwest—now control an estimated 80 percent of the domestic market. If this merger goes through, that number will decline to 4. Should this be the last merger in the airline industry so far and no farther? Would allowing this merger finally strike the right balance between competition and the cyclical bankruptcies that have occurred in the industry recently?

A major concern any time there is fluctuation in the airline industry is how smaller airports, which depend heavily on routes to and from larger hubs, would be affected. For travelers leaving from my district, the airport in Charlotte, North Carolina is a major hub destination, and US Air has invested heavily in Charlotte.

Would American maintain or even expand this and other hubs post-merger? It is by no means clear that this merger would have all or any of the negative effects that an airline merger can produce. American and US Air maintain that their routes are mostly complementary, not overlapping, and that the merger will enhance competition by giving the current 4th and 5th largest airlines a stronger position from which to compete with the other 3.

Congress has no formal role in the Department of Justice's merger review process. Congressional hearings, however, provide important public venues to ask, debate, and identify possible answers to these questions which are of great importance. Rather than rushing to judgment, my hope is that everyone involved will take care to evaluate the evidence and do what is best for competition and consumers.

I look forward to the testimony of the witnesses, debate among the Members of the Subcommittee, and, in the end, a wise decision by the Department of Justice that ensures a competitive future for the airline industry and protects the welfare of American travelers.

Thank you, Mr. Chairman.

Mr. BACHUS. Thank you. At this time, Mr. Cohen, the Subcommittee Ranking Member, is recognized.

Mr. COHEN. Thank you, Mr. Chairman. This is the first hearing of the newly renamed Subcommittee on Regulatory Reform, Commercial and Antitrust Law. We used to call it CAL. I call it RRCAL.

I thank Chairman Bachus for choosing the topic of this merger between American and US Airways for our first hearing, and I want to say I look forward to what I hope and know will be a productive working relationship in the 113th Congress. The third Saturday in October is not the only time Alabama and Tennessee get together.

As an initial matter, I note that unlike with previous mergers, the unions representing workers at both these airlines have expressed strong support for the merger, and that is encouraging. Some news accounts suggest that the unions at American were particularly instrumental in agreeing to this move. Mr. Chairman, I would ask unanimous consent that the final joint release, dated February 14, from the different unions be entered into the record.

Mr. BACHUS. Without objection.

Mr. COHEN. I also ask unanimous consent that the letter from Laura Glading, president of the Association of Professional Flight Attendants, and the statement from Captain Coffman, Chairman of the Allied Pilots Association, expressing support for the merger, both be entered into the record.

Mr. BACHUS. Without objection.

[The information referred to follows:]

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FOR IMMEDIATE RELEASE

UNIONS REPRESENTING 60,000 AIRLINE EMPLOYEES UNITE IN THEIR STRONG SUPPORT OF MERGER BETWEEN AMERICAN AIRLINES AND US AIRWAYS

Transport Workers Union (TWU), Allied Pilots Association (APA), US Airline Pilots Association (USAPA), Association of Professional Flight Attendants (APFA), Association of Flight Attendants (AFA) Working Together in the Creation of a Premier Global Carrier

Sets Historic Precedent for Labor-Management Partnership within the Airline Industry

Merger Will Provide a Path for Competitive Compensation and Benefits

DALLAS, TX - February 14, 2013 – Leaders from five major unions representing more than 60,000 American Airlines and US Airways employees today voiced their strong support for the merger of AMR Corporation (OTCQB: AAMRQ), the parent company of American Airlines, Inc., and US Airways Group, Inc. (NYSE: LCC). The merger of American Airlines and US Airways was announced today.

-more-

James C. Little, International President, TWU, said, "Our members have made major sacrifices over the past year. We are pleased that today American Airlines and US Airways have reached a positive step toward building a stronger, more secure and more competitive airline. This should benefit both travelers and workers. Much more work needs to take place before all of the parts that will make up a New American Airlines are assembled, but the airline we're building should be better than the old American and US Airways."

Keith Wilson, President of the Allied Pilots Association at American Airlines said: "We are excited with today's announcement, which we believe is the right path forward for American Airlines and its employees. This combination paves the way for a new, more competitive American Airlines and a brighter future for the dedicated employees of the combined company. We recognized the value of merging at the very beginning, and worked for the past year to help bring this deal to fruition. Employees of the new American Airlines will enjoy competitive compensation and benefits, and will be part of a stronger airline which will create greater opportunities over the long term."

Captain Gary Hummel, President, USAPA, said, "This merger came about due to the cooperative efforts of both management and labor. As pilots, we are proud to be a part of the New American Airlines and look forward to working with our colleagues at the Allied Pilots Association, building our new company into a financially strong, premier global carrier."

Laura Glading, APFA President said "It's been a long, tough road but the result is well worth it. Today's announcement proves that everyone benefits when labor has a seat at the table. The new American will provide job security and fair compensation for all employees and another great option for the flying public. Flight attendants are eager to help build a strong and competitive airline and bring American back to prominence."

Deborah Volpe and Roger Holmin, Presidents of the Association of Flight Attendants - CWA at US Airways said: "Flight Attendants are ready to participate in the benefits that will be generated by the strong network combination of American Airlines and US Airways. We are proud to be a part of the frontline that makes our airline a success and we look forward to the new opportunities we will generate by working alongside our counterparts at American."

Association of Professional Flight Attendants (APFA)
Founded in 1977, the Association of Professional Flight Attendants (APFA) is the largest independent Flight Attendant union in the nation. It represents the 16,000 Flight Attendants at American Airlines. APFA Members live in almost every state of the nation and serve millions of Americans as they travel the nation and the world. Laura Glading is serving in her second four-year term as president of the union. For more information visit apfa.org.

Association of Flight Attendants-Communications Workers of America, AFL-CIO (AFA)
The Association of Flight Attendants is the world's largest Flight Attendant union. Focused 100 percent on Flight Attendant issues, AFA has been the leader in advancing the Flight Attendant profession for 67 years. Serving as the voice for Flight Attendants in the workplace, in the aviation industry, in the media and on Capitol Hill, AFA has transformed the Flight Attendant profession by raising wages, benefits and working conditions. Nearly 60,000 Flight Attendants come together to form AFA, part of the 700,000-member strong Communications Workers of America (CWA), AFL-CIO.

-more-

Association of Professional Flight Attendants

*Proudly Representing the **Flight Attendants** of American Airlines*

Office of the President

February 21, 2013

The Honorable Bob Goodlatte
2309 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Goodlatte:

On February 14, 2013, the management of American Airlines and US Airways announced their intention to merge the two companies to form the world's largest airline. Employees of both airlines welcomed the news with great excitement. As the president of the Association of Professional Flight Attendants, representing over 16,000 flight attendants at American, I can say that our workgroup is very much looking forward to the day our operations are combined. The merger is good news not only for employees, but also for the company, its investors, the commercial aviation industry, and the flying public.

At this time last year, American's three major unions representing flight attendants (APFA), ground workers (TWU), and pilots (APA) were locked in tense contract negotiations with our bankrupt carrier. Under Section 1113 of the U.S. Bankruptcy code, the debtor may throw out its labor agreements and impose new contracts as a part of the restructuring process. American had proposed furloughing over 2,000 flight attendants, slashing our pay and benefits, terminating our pensions, and stripping away most of the protective provisions in our contract. As American's unions desperately negotiated against such deep cuts, we were approached by the management team of US Airways with a strategic alternative to American's standalone plan of reorganization. We listened to what they had to say and we liked what we heard.

US Airways' plan to merge its operations with American's creates a much more robust network. The combined company will allow American to once again compete nationwide. Additionally, the new American will strengthen service to Europe and South America. With a fleet, product, and network that rival those of Delta and United, American will break the duopoly currently controlling our industry and give consumers another strong option for air travel within the United States and beyond.

1004 West Euless Blvd. • Euless, Texas 76040
Tel: (817) 540-0108 • Fax: (817) 540-2077

American's labor unions immediately recognized the value in the merger plan. As a viable third option for business and leisure travel, American will generate the revenues necessary to sustain industry-rate contracts for the employees of both carriers. Moreover, not a single flight attendant will be furloughed as a result of the merger. The unionized employees at American want our company to succeed. That is why we support the merger and why we worked together to effect it.

Throughout our company's bankruptcy and while we pursued the US Airways plan in particular, the employees at American Airlines had a strong ally in the federal government. The Pension Benefit Guaranty Corporation, under the strong and visionary leadership of Director Josh Gotbaum, fought to protect American's workers and America's taxpayers. As a member of the unsecured creditors' committee, the PBGC worked alongside American's labor unions to ensure that the company's costly pension liabilities would not become the government's burden. Furthermore, the PBGC staff understood that the merger would provide long-term stability to employees' jobs, compensation, and benefits and were instrumental in bringing that plan to fruition. The APFA is extremely grateful for their commitment and perseverance.

While we know the path forward will be challenging, APFA believes the benefits the new American will provide to the traveling public, our colleagues, and our membership are well worth the tremendous effort that merging these two carriers will require. I hope that you can share in our enthusiasm and optimism for the future of our company and our careers. Thank you for your support and we look forward to seeing you on board.

Sincerely,

Laura R. Glading

Laura Glading
President, APFA

Statement for the Hearing Record

Captain Robert Coffman, Chairman, Allied Pilots Association Government Affairs Committee

U.S. House of Representatives Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing: "Competition and Bankruptcy in the Airline Industry: The Proposed Merger of American Airlines and US Airways"

February 26, 2013

On behalf of the 10,000 American Airlines pilots represented by the Allied Pilots Association (APA), we want to thank Chairman Bachus, Ranking Member Cohen and the other members of the Subcommittee on Regulatory Reform, Commercial and Antitrust Law for the opportunity to present written testimony on the proposed merger of American Airlines and US Airways.

APA strongly supports the proposed merger. Well before American Airlines declared Chapter 11 bankruptcy on Nov. 29, 2011, we understood that our airline needed to make significant changes to become more competitive. To protect our pilots' interests during the Chapter 11 process, we assembled a team of highly capable outside advisers, including financial and restructuring experts from Lazard and one of the nation's most experienced airline bankruptcy attorneys. APA then proceeded to negotiate a conditional labor agreement with US Airways, as did our fellow front-line employees represented by the Association of Professional Flight Attendants and Transport Workers Union. These conditional labor agreements mitigated concerns about "labor risk" and helped generate momentum for the proposed merger.

As one of nine members of the Unsecured Creditors' Committee, APA has remained closely involved throughout American Airlines' ongoing restructuring. We represent an educated and engaged membership that is passionate about helping to ensure American Airlines survives and thrives.

With the mergers of Delta-Northwest and United-Continental, American Airlines has been relegated to a distant third in terms of revenue generation and the breadth of our network. One of the adverse consequences of this marginalization has been the defection of high-value corporate customers from American Airlines to our larger network-carrier competitors. For those consumers and companies needing an array of travel options, their choices have effectively been narrowed to Delta and United.

The most expedient way to address American Airlines' revenue and network shortfalls is to merge with another carrier, and US Airways is the most logical merger partner. The two airlines overlap on only 12 city pairs that we respectively serve. By combining the two carriers, the new American Airlines would serve 336 destinations in 56 countries, giving the traveling public access to a third comprehensive global network comparable to what Delta and United already operate.

The past 10-plus years have been extremely challenging for our industry. The Sept. 11, 2001 terrorist attacks and other exogenous shocks triggered a series of bankruptcy reorganizations that were devastating for employees and other stakeholders. We now face the prospect of relative stability thanks to consolidation, with the combination of American Airlines and US Airways representing what industry analysts characterize as "the last big merger" that would complete the industry's restructuring. Among the beneficiaries of a more stable industry: the many employees, communities and businesses that depend on reliable air carrier service. According to Airlines for America, for every 100 airline jobs, another 360 additional jobs are supported. By approving the merger of American Airlines and US Airways, the United States Department of Justice would help to ensure that our country's commercial aviation system continues on its path to greater stability for the benefit of all concerned.

Critics of the proposed merger cite the potential for higher ticket prices. A December 2012 study by PricewaterhouseCoopers titled "Airline mega-merger impact on the U.S. domestic airline industry" illustrates that such concerns, while understandable, are unfounded. According to this study, average U.S. domestic airfares have not increased significantly in the past seven years despite industry consolidation. From 2008 through year-end 2011, fares increased by 1.7 percent annually—less than the inflation rate for that period, which spans the global financial crisis and subsequent recovery.

Conversely, if American Airlines and US Airways are prohibited from merging, APA is concerned about the ramifications for the many hard-working men and women across our nation whose livelihoods depend upon a stable, prosperous airline industry.

Chairman Bachus, Ranking Member Cohen and members of the committee, thank you again for the opportunity to submit written testimony.

Mr. COHEN. Thank you, Mr. Chairman. I understand why labor supports this proposed merger. Employees of both carriers are poised to get a better deal than they would otherwise, which is more than I can say unfortunately for the employees of the former Northwest Airlines, many of whom were my constituents in Memphis.

As we consider the merits of this merger, we ought to look back, though, what the similar effects of mergers that are similar in the recent past to see how it benefits consumers and what happens. And while I respect the views of labor in support of this merger and recognize that no two mergers of airlines or any other entities are necessarily alike, the merger of Northwest and Delta has indelibly been shaped by an image of airline mergers.

Prior to the merger, Northwest operated a significant hub in Memphis, and for this reason and given Memphis' proximity to Delta's hub and headquarters in Atlanta, I expressed concern about the potential cost of the merger to consumers and employees in my home district.

In this very room in 2008, Richard Anderson, Delta's CEO, said about the future of the Memphis hub, it will be additional. It will be more business for Memphis, not less. I expressed concern to him about reduced service or even outright elimination of the hub, and asked him about continuation of the Memphis-Amsterdam international flight, of which we had great pride. At that hearing, Mr. Anderson in this room testified there would be no hub closures, and he said the merger would maintain international flights to Amsterdam. He went further to say we could expect more international flights from Memphis and suggested Memphis to Paris was going to happen, and he said there would be more flights. This will enhance the status of traffic and service at the Memphis International Airport. He said it would add, not delay—not take away from Memphis International Airport.

He said he knew Memphis from when he was at Northwest, and he loved the ribs, he loved the city, he knew how great the airport was, how well-managed it was, how the time on the tarmac and taking off was less, that they saved oil, and it was the best connections they could possibly have. Those facts were true. His response was not.

I asked US Air and American to look at Mr. Anderson's statement and understand that Memphis International Airport is a place they should be. And when other airlines did not come to Memphis, US Airways did. They added additional flights from Memphis to Washington at better prices, and I appreciate that. We like that competition, and US Airways did something other airlines did not.

When Frontier Airlines thought about coming into Memphis, Northwest cut their prices. That eliminated the opportunity for Frontier to come in. Later People Express expressed an interest in coming into Memphis. And because Delta had such a dominant market share, People Express did not.

The opportunity in Memphis is there. Before the merger, there were 240 flights a day out of Memphis International Airport. As of this December, there 40 percent of that service, or simply 96 flights, not 240. It would not surprise me to see further cuts. And

on Saturdays it looks like Dodge City. So ribs are plentiful. There is opportunity for US Airways to come into Memphis and to fly these routes, US Airways/American, and to serve Memphis.

Delta has used its base in Memphis to keep carriers out and not have real competition. Memphis consumers pay higher prices than almost any airport in the country, and this has cost businesses to not choose Memphis as a place where they want to come because they do not get the service. Federal Express needs the service and supplies it. Federal Express takes some of their product and puts it all in the airlines, which can help your airlines serve Memphis.

Call Fred Smith, Mr. Johnson. He will tell you, come to Memphis, and so do I.

So there are plenty of reasons why when we look at this merger, and I understand wonderful things about—I have heard about Mr. Johnson and Mr. Kennedy, and we need to look at it differently. We have heard from Richard Anderson. We do not want a repeat performance. But the basis upon which he made his untrue statements are still valid. Memphis International Airport is a fine airport, great service, great weather, great opportunities to save on fuel, and a great city to serve.

I appreciate your being here. I appreciate Mr. Bachus scheduling this hearing. I look forward to the testimony, and I look forward to US Airways and American serving Memphis, America's great city, and Memphis International Airport, the great airport that it is.

Thank you, Mr. Bachus. And I will also give you a statement and ask unanimous consent to enter a statement from Mr. McGhee and Mr. Slover of the Consumer Union expressing concerns about this merger.

Mr. BACHUS. Without objection.

[The information referred to follows:]

ConsumersUnion
POLICY & ACTION FROM CONSUMER REPORTS

STATEMENT OF

WILLIAM J. McGEE
GEORGE P. SLOVER

CONSUMERS UNION

BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

ON

COMPETITION AND BANKRUPTCY IN THE AIRLINE INDUSTRY: THE PROPOSED MERGER OF AMERICAN AIRLINES AND US AIRWAYS

FEBRUARY 26, 2013

Chairman Bachus, Ranking Member Cohen, and Members of the Subcommittee: Consumers Union, the nonprofit publisher of Consumer Reports, commends the Subcommittee for holding this important hearing, and we appreciate the opportunity to present our views.

We are well aware that the airline industry has been under considerable financial stress in recent years, leading to a number of reorganizations under the bankruptcy laws. And we know that the urge to merge can be powerfully seductive even under the best of circumstances.

But we have seen growing consolidation in the airline industry in recent years bring substantial harm to consumers, communities, and the economy. We are concerned that the proposed merger between American Airlines and US Airways has the potential to further deprive air travelers of healthy, robust competition, and to further deprive communities of being part of a vibrant air transportation network. We believe the proposed merger warrants a careful and thorough investigation by the Antitrust Division and the Department of Transportation.

This merger was formally announced just two short weeks ago, on Valentine's Day, and the full review of its implications is just getting underway. But the potential harms to the public that could result from allowing this corporate courtship to be consummated are clear enough already.

These two airlines are singing a song we've heard sung many times before. For the fifth time in the past decade, executives from one legacy network airline are attempting to acquire the assets of a second. Each time, the airlines promise that air travelers will benefit from a stronger airline with a wider reach, more determined and able than ever to compete vigorously.

That's what American and US Airways are saying now. And that's what we heard from United and Continental when they merged, from Delta and Northwest when they merged, from US Airways and America West when they merged, and from American and TWA when they merged – or technically, when American acquired TWA's assets in bankruptcy.

That's what we always hear. But what we have found, once the merger goes through and the dust settles, is not greater choice and better value for consumers. Instead we find flights reduced, and hubs downgraded or abandoned, as the new combined airline sees less need to provide those greater choices in flights and routes once they have less competition to worry about.

The bottom line changes for the merged airline, and not necessarily in ways that translate into good news for the rest of us. Consumers lose choices, workers lose jobs, and communities lose business activity and the associated tax base and job opportunities. The interests of consumers and communities get overlooked in favor of the interests of the senior executives and major investors of the two airlines.

Two decades ago, there were 11 legacy network airlines in the United States. If this pending merger is approved, the country will be served by only three full-service airlines – four if you include Southwest – along with Alaska Airlines, and a handful of smaller low-cost and regional airlines who have themselves been merging. Analysts estimate that American, United, Delta, and Southwest combined will comprise 87% of the domestic market,[1] a concentration never before seen in the modern era of American commercial aviation

Consumers Union urges that this latest proposed merger be viewed against this backdrop of ever-increasing consolidation and the harm left in its wake. In this regard, we are concerned that the Antitrust Division and the Department of Transportation may have been examining these mergers with too narrow a focus, to the exclusion of important dynamic and macro effects.

We agree that the Antitrust Division's customary market-by-market scrutiny is critical to identifying specific city-to-city routes that are likely to suffer an immediate reduction in competitive choice for travelers. But isolated market-by-market divestitures, even assuming they succeed in keeping viable competition in the specific routes involved in the short-term, do not in our view adequately take into account the larger anticompetitive dynamics that come into play as the number of competing airline networks is reduced below a critical threshold. We hope the government's review will pay heed to these macro effects as well. The individual trees are important, but they cannot thrive in the absence of a healthy forest.

The following are some of the key issues of concern, similar to issues we have raised regarding previous airline mergers, that we believe need to be part of a full and thorough review of this proposed merger:

- FEWER FLIGHTS, FEWER CHOICES.

Historically, we have not seen a merger among major carriers that has *not* led to reductions in service. In fact, the primary motivation driving an airline merger, aside from the prospect of increased profits from reduced competitive pressure, is typically the elimination of what become unprofitable redundancies after the merger, but are competitive niches before the merger, when the two carriers are still competing. After American acquired TWA in 2001, for example, the merged airline's daily departures out of TWA's former hub in St. Louis plunged from nearly 500 down to just 36 – undoubtedly adding to the merged airline's profits, but at the expense of a drastic reduction in flying choices for consumers, and a diminished convenience as a business home or destination of the city once celebrated as the Gateway to the West. Similarly, here we can expect fewer flights, and fewer non-stop routes.

[1] USAToday.com, Feb. 14, 2013: (www.usatoday.com/story/travel/flights/2013/02/13/american-usairways-merge/1916961)

- HIGHER FARES.

It is a fundamental and widely accepted economic principle, demonstrated by experience, that a reduction in competition leads to a reduction in output and an increase in price. And the airline industry is no exception. We can expect fewer promotional fare sales, and fewer rebellions against fare increases and new fees. As the Government Accountability Office put it in a July 2008 report on airline mergers, "Mergers and acquisitions can also be used to generate greater revenues through increased market share and fares on some routes."[2] Again, good for airline profits, but not so good for airline consumers.

- LOWER QUALITY OF SERVICE.

The more concentrated the airline industry becomes, the less incentive the airlines have to compete on customer satisfaction, including comfort, on-time flight performance, baggage handling, and conflict resolution. In addition, the synergies that the merging carriers so confidently predict often fail to fully materialize. Merging firms are prone to underestimate the difficulty of merging two workforces operating under two distinct corporate cultures. Blending these two airline carriers, whose workforces are probably still adjusting to the previous mergers in their respective employers undertook not so long ago, could be especially challenging.

- DEVALUED FREQUENT FLYER BENEFITS.

Airline frequent flyer programs originally were labeled "loyalty programs." But as the competition among airlines decreases, so does the need for them to worry about customer loyalty. This has spurred airlines to rewrite their frequent flyer program rules to lower the currency value of miles traveled, to put expiration dates on accumulated miles, and to add redemption fees. For members of American's AAdvantage and US Airways's Dividend Miles programs, the merger will not only mean even less competition; it will also mean an increased pool of frequent flyers with fewer open seats and upgrades to go around.

- HIGHER BARRIERS TO ENTRY.

As the DOT has noted, in what they have termed the "Southwest effect," Southwest and other low-cost carriers have provided a vital service to consumers by increasing competition and reducing fares in dozens of American cities. But an industry comprising only a "Big Three" oligopoly operating out of fortress hubs will make it much more difficult for new low-cost airlines to enter and compete effectively.

[2] "Potential Mergers and Acquisitions Driven by Financial and Competitive Pressures," GAO-08-845, July 31, 2008

Mr. COHEN. Thank you, sir, and I yield back the balance of my time. It does not exist, but that is traditional to yield it back. [Laughter.]

Mr. BACHUS. I guess let the record show that Mr. Cohen does not want you to merge with Delta Airlines. [Laughter.]

Our first witness is—well, without objections, other Members' opening statements will be made a part of the record.

[The prepared statement of Mr. Johnson follows:]

Congressman Henry C. "Hank" Johnson, Jr.

Judiciary Hearing on US Airways-American Airlines Merger

STATEMENT

As the former Chairman of the Subcommittee on Courts and Competition Policy, I have long supported competition, consumer welfare, and workers' rights.

The proposed merger between US Airways and American Airlines would go a long way in normalizing the salaries and working conditions of many pilots, attendants, and ground workers.

Our economy continues to recover, but that recovery has not been nearly swift enough for many American workers who have seen frozen or below-market pay, furloughs, or have lost their job altogether. This hardship is particularly felt by young workers and the long-term unemployed who have not realized new opportunities.

This hearing is an opportunity to examine how this merger helps airline employees, whether it promotes consumers' interests, and whether it raises concerns about job loss.

This inquiry is especially timely as the deadline for preventing sequestration looms. If this body does not address sequestration, American workers will face yet another hurdle to providing for their families and realizing the American dream.

House Republicans have ushered in a mindless form of austerity that takes a meat-cleaver approach to cutting programs, regardless of the wisdom of doing so or the long-term costs that these cuts would create.

Indeed, the only plan that House Republicans have advanced is one that would not stem job loss, but one that would cut the programs that help the unemployed, the sick, and the poor.

Sequestration threatens to forestall economic recovery, amplifying the effects of the recession on so many Americans.

I approach this hearing with these concerns in mind, and I look forward to the testimony of today's witnesses to address how the merger will affect workers. Although this airline merger is unlike those examined by previous hearings in this regard, I continue to encourage the Department of Justice to consider the impact of this merger on employees and American jobs, and how best to serve the American public.

Mr. BACHUS. And at this time, I will introduce the witnesses.

Gary Kennedy, representing US Air—no, American. You are going to go first, yeah, that is right. As senior vice president, general counsel, and chief compliance officer to American Airlines, Mr. Kennedy directs all of American's legal affairs worldwide. Mr. Kennedy also directs American's corporate compliance program and oversees corporate governance matters.

Before joining American Airlines in 1984, he practiced law in Salt Lake City. Mr. Kennedy is a magna cum laude graduate of the University of Utah, where he was a member of Phi Beta Kappa. He received his JD from the University of Utah School of Law.

And we look forward to your testimony, Mr. Kennedy. And as I have told you privately before the hearing started, I have seen tremendous improvement in US Airway's operations, and the staff, and the service. And it has been a real transformation, and I compliment you and the management team at US Airways. And actually, you are American and I'm complimenting you. I should have been complimenting Mr. Johnson, right, so I apologize for that.

And now I will get to Mr. Johnson and compliment you. Mr. Johnson, executive vice president of corporate and government affairs at US Airways, where he oversees corporate, legal, and regulatory affairs.

Prior to joining US Airways in 2009, Mr. Johnson was a partner of Indigo Partners, LLC, a private equity firm specializing in acquisitions and strategic investments in the airline and aerospace industries. Mr. Johnson also served as executive vice president with American West Corporation prior to its merger with US Airways.

He earned his MBA and JD from the University of California-Berkeley and his BA in economics from Cal State University in Sacramento.

Thank you, Mr. Johnson, for testifying. And what I said to Mr. Kennedy about US Airways, obviously applies to you. And I did tell both of you all, and I was thinking the testimony was going to be flipped, but it really is a well-managed airline. And I do not travel American, so I really do not have that many occasions to travel on American. But when I did, they were very professional.

Our third witness is Mr. Kevin Mitchell with the Business Travel Coalition. He is chairman and founder of the coalition where he advocates for the corporate travel community in North America, Europe, and Asia. He has over 40 years' experience in restaurant, hospitality, sports management, business aviation, and business travel industries.

Before joining or founding BTC, Mr. Mitchell served as vice president of CIGNA Corporation. And he received his BA in international relations from St. Joseph's University in Philadelphia in 1980.

We thank you for testifying.

Our fourth witness, Professor Sagers, Christopher L. Sagers, professor of law at Cleveland-Marshall College of Law in Cleveland, Ohio, where he specializes in administrative law, antitrust law and economics, and business regulation.

Before joining the academy, Professor Sagers was in private practice in Washington, D.C., at the law firm of Arnold & Porter and Shea & Gardner. He earned his JD cum laude from the Uni-

versity of Michigan School of Law and his masters of public policy from the University of Michigan.

We thank you for testifying, Professor Sagers.

Our last witness is Dr. Clifton—it is Clifford, is it not? Clifford Winston, Ph.D., at The Brookings Institution. He is senior fellow in economic studies there. His research focuses on analysis of industrial organization, regulation, and transportation. He was the co-editor of the annual micro-economic edition of Brookings' paper on economic activity, and has authorized numerous books and articles. Before coming to Brookings, Dr. Winston was an associate professor at MIT.

Dr. Winston received his AB and Ph.D. from the University of California-Berkeley, and his masters from the London School of Economics.

Thank you for testifying.

And, Mr. Kennedy, you will go first with your public statement. Each of the witnesses' written statements will be entered into the record in its entirety. And I ask each witness to summarize his testimony in 5 minutes or less.

To help you stay within that time, there is a timing light on your table, and when the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals the witness' 5 minutes have expired. But I am actually more lenient than most people, so if you need to go on another minute, that is fine with me.

I now recognize Mr. Kennedy for 5 minutes.

TESTIMONY OF GARY F. KENNEDY, SENIOR VICE PRESIDENT, GENERAL COUNSEL AND CHIEF COMPLIANCE OFFICER, AMERICAN AIRLINES

Mr. KENNEDY. Chairman Bachus, Ranking Member Cohen, and Members of the Subcommittee, thank you for the opportunity to testify today.

My name is Gary Kennedy, and I am the senior vice president, general counsel, and chief compliance officer for American Airlines. I have been intimately involved in both the Chapter 11 restructuring of our company and the proposed merger between American and US Airways.

As the Committee knows well, the airline industry has experience severe economic turbulence over the past decade. The shockwaves from the events of 9/11 created enormous difficulty in the aviation industry, and all U.S. carriers grappled with ways to survive in the wake of the emotional and economic upheaval created by those terrible events.

In 2003, US Airways was on the brink of filing for bankruptcy protection, but thanks to the willingness of our organized labor representatives to take the steps necessary at that time to reduce costs, we avoided a chapter 11 filing. For the next 8 years, we struggled to find a way to financial stability. Despite our best efforts, our losses continued to mount, reaching $12 billion over the previous 10 years. In November 2011, our board came to the painful conclusion that time had run out. The only viable path forward was to restructure our business under Chapter 11 of the Bankruptcy Code.

There is no easy to describe how difficult our bankruptcy reorganization has been for the company and our employees. Beginning at the top of the organization, we reduced our senior management ranks by 35 percent. We then moved through the balance of the organization making necessary changes, including the reduction of 15 percent of total management staff.

Meanwhile, we began renegotiating certain of our secured obligations, our leases, and our contracts with vendors. We also negotiated new long-term contracts with each of our organized labor groups. These new contracts include productivity improvements and changes to health and retirement benefits. At the same time, we increased pay for our employees and mitigated job losses by offering retirement incentives.

One of the most important objectives we achieved was to freeze rather than terminate our employee pension plans. As a result, we now expect to fulfill those obligations rather than unload them on the PBGC as other airlines have done.

Of course all that we accomplished was done in the context of our Chapter 11 case and in consultation with the official Unsecured Creditors Committee appointed by the United States Trustee. By mid-summer last year, we made sufficient progress that we decided, in conjunction with the Creditors Commission, to embark on a formal process to consider a merger with US Airways.

It was clear from the outset of our review that a merger with US Airways could create significant value for our stakeholders and bring substantial benefits to the traveling public. We have conservatively estimated that by 2015, revenue and cost synergies will outweigh cost dyssynergies by over $1 billion. This combination will make our company a much stronger competitor against the other large airlines.

We are under no illusions that mergers are easy or seamless. We have agreed from the outside to do everything in our power to learn both from the success and the mistakes of those who have gone before us. Many of the most important decisions have already been made. The combined company will use the great American Airlines brand, the company will remain headquartered in Dallas-Fort Worth area, and all hubs in both systems will continue to be hubs in the new American.

Our CEO, Tom Horton, and US Airways CEO, Doug Parker, will jointly lead both the transition team and the New American as it emerges from bankruptcy. Mr. Parker will be CEO of the new company, and Mr. Horton will be chairman of the board.

Now, I understand and recognize that many Members of Congress are skeptical of promises made in these situations, and also concerned about industry concentration. As to the former, we do not intend to make commitments that we cannot keep. And as to the latter, it is clear that this merger does not create a high degree of concentration.

Above all, however, I would urge you to consider the facts with which I began my testimony. Nothing has been more damaging for the airline industry, our employees, our customers, and our shareholders than the years of economic turmoil we have experienced.

This transaction is unique in that it is endorsed by all of our labor unions and embraced by management and the boards of both

companies. We know we have a solemn obligation to implement this transaction with great care and thought, and we are eager to do so.

Thank you for the opportunity to testify today.

[The prepared statement of Mr. Kennedy follows:]

Prepared Statement of Gary F. Kennedy, Senior Vice President, General Counsel and Chief Compliance Officer, American Airlines, Inc.

Chairman Bachus, Ranking Member Cohen and Members of the Subcommittee, thank you for the opportunity to testify today about the issues of airline competition, bankruptcy, and the proposed merger of American Airlines and US Airways. We appreciate the manner in which this hearing is structured as all of these issues are inter-related.

As General Counsel of American Airlines, I have been intimately involved in both the Chapter 11 restructuring of the company and the proposed merger between American and US Airways. I would like to give you a sense of how we arrived at this point from American's point of view and why this transaction is so critical to the customers, employees and communities of both companies. I believe Mr. Johnson from US Airways will address what both companies hope to achieve going forward.

As this Committee knows well, the airline industry has experienced severe economic turbulence over the past decade. The shock waves from the events of 9/11 created enormous difficulty in the aviation industry and all US carriers grappled with ways to survive in the wake of the emotional and economic upheaval created by those terrible events. This was followed by the unprecedented run-up of jet fuel prices in the summer of 2008 and the financial collapse of the economy that further strained our industry as corporations cut travel budgets, and discretionary spending on non-essential items plummeted. The consequences were significant. During this period, there were a series of airline bankruptcies, severe cuts in capital expenditures, the furlough of thousands of employees, the loss of air service to many communities, and three major commercial air carrier mergers.

For most of the past decade, American Airlines took a different path than many of our competitors. In 2003, we were on the brink of filing for bankruptcy protection, but thanks to the willingness of our organized labor representatives to take the steps necessary at that time to reduce costs, we avoided a Chapter 11 filing. For the next eight years, as our major competitors reduced costs through their own Chapter 11 cases and created larger and more attractive networks through consolidation, we struggled to find a path to financial stability, while maintaining a generous package of benefits for our workers and quality service for our customers.

As we worked hard to avoid a bankruptcy filing, our largest competitors were embarked on a different course and new entrants were poised to take advantage of the turmoil being experienced by the legacy carriers. In 2001, American was the largest airline in the world. With the mergers of Delta and Northwest, United and Continental, and Southwest and AirTran, American became the fourth largest carrier domestically and dropped to the third largest carrier globally. At the same time, low cost carriers, old and new, continued to grow and enter more markets. Today, the vast majority of our passengers are flying on routes with competition from one or more low cost carriers, and that number is expected to increase. That will certainly be the case in the Dallas/Fort Worth region and elsewhere when the Wright Amendment perimeter rule is lifted next year.

In addition to the changes occurring on the domestic front, the configuration of international global airline alliances was also changing. Although the joint business venture among British Airways, Iberia, and American was finally approved after 13 years, we had fallen far behind our US competitors, all of which enjoyed the benefit of a much earlier approval of their joint ventures. In short, on a competitive and financial basis we continued to lag far behind the rest of the industry.

American did not stand idly by during these years. We undertook a variety of steps to position ourselves for long-term success. We strengthened our network by focusing on markets with the greatest concentration of business travelers, and we fortified our alliances with the best international partners. We signed a historic and transformational aircraft purchase agreement for 550 new aircraft, one that promised to give us one of the most modern and fuel efficient fleets in the industry. And, we began investing again in our products, services and technology to create a world-class travel experience. Despite our efforts and the substantial progress we made to succeed in the long term, our losses continued to mount, reaching $12 billion over the previous 10 years. And, there was no end in sight.

In November 2011, our Board came to the painful conclusion that time had run out. The only viable path forward was to restructure our business under Chapter 11 of the Bankruptcy Code. Of course, in the months and years leading up to our Chapter 11 filing, we gave strong consideration to possible merger partners. Given our weak financial condition at the onset of our restructuring and the fact that we had yet to establish a track record of financial improvement and value creation, we determined that we must first get our own house in order before we could properly evaluate a potential merger with another airline. Indeed, until we had a line of sight to a far more stable financial structure, both in terms of revenues and costs, we believed we would not be negotiating from a position of strength and, as such, would be more challenged in fulfilling our duty to maximize value for our owners.

On the day we filed for relief under Chapter 11, we had a change in leadership. Our new CEO, Tom Horton, asked everyone at the company to work hard to achieve a successful restructuring, while continuing to run a top notch airline with great service to our customers. He reminded us that with a strong balance sheet, a competitive cost structure and restructured contracts that allowed us to compete on a level playing field, we could then appropriately consider a range of strategic options.

There is no easy way to describe how difficult our bankruptcy reorganization has been for the company and our employees. Beginning at the top of the organization, we reduced our senior management ranks by 35 percent. We then moved through the balance of the organization making necessary changes, including the reduction of 15% of total management staff. Meanwhile, we began renegotiating certain of our secured obligations, our leases, and our contracts with vendors. We eliminated significant expenses and tightened our belts in every department of the company. Most importantly, we entered into intense negotiations with our labor unions in an effort to improve productivity and reduce overall costs. While this was a long and difficult process, we achieved new long term contracts with each of our organized labor groups. These new contracts include productivity improvements and changes to health and retirement benefits that put American on a level playing field with the legacy carriers. At the same time, we increased pay for our employees and mitigated job losses by offering retirement incentives. One of the most important objectives we achieved was to freeze, rather than terminate, our employee pension plans. As a result, we now expect to fulfill those obligations, rather than unload them on the PBGC, as other airlines have done.

Of course, all of what we have accomplished was done in the context of our Chapter 11 case and in consultation with the Official Committee of Unsecured Creditors appointed by the US Trustee.

As we worked our way through our Chapter 11 case, we were approached by US Airways early last year with a merger proposal. At that time, we declined to engage in discussions with them. Instead, we continued to work on our reorganization. As we did, a number of positive developments quickly emerged. First, we began to see encouraging financial and operational results. Operating costs were down and, just as importantly, revenues began to rise—topping the US industry in year-over-year unit revenue improvement for six straight months—and our operational performance began to improve to the best levels in many years. By mid-summer we had enough certainty around our standalone plan and our improving financial position that we decided, in conjunction with the Creditors Committee, to embark on a formal process to consider strategic alternatives.

As part of this process, we entered into a non-disclosure agreement with US Airways that allowed both companies to share information and engage in a detailed analysis of the potential benefits of a combination. The Creditors Committee, through its financial and legal advisors, actively participated in this undertaking. Later in the process, an Ad Hoc Committee, consisting of substantial holders of our unsecured debt, also reviewed the proposed combination in significant detail. It is fair to say that multiple parties scrutinized and evaluated this proposed transaction. Ultimately, we agreed to a structure with American stakeholders owning 72% of the combined companies.

It was clear from the outset of our review that a merger with US Airways could create significant value for our stakeholders and bring substantial benefits to the traveling public. We have conservatively estimated that by 2015 revenue and cost synergies will outweigh cost dis-synergies by over $1 billion. The majority of these revenue synergies are derived by combining two complementary networks that will offer consumers more service at more times to more places. And because this will be a merger of complementary networks, these benefits come with virtually no loss of competition. Of the more than 900 domestic routes flown by the two carriers, there are only 12 overlaps. This is one reason we are convinced that this merger is consistent with good public policy. The combination will make our company a much stronger competitor against the other large airlines. Consumers will have

three strong, healthy global network carriers from which to choose, as well as a number of low cost carriers, including Southwest, JetBlue and Virgin America. The new American will have the financial strength to invest the resources needed to improve the customer experience, including new aircraft, cutting edge products and services, and the technology and tools designed to help our employees deliver superior service to our customers.

The combined airline will offer new routings for our passengers in thousands of additional markets. For American, the greatest benefit derives from two principal components. First, US Airways offers a substantial network in the Eastern section of the country. This will complement our strong operations in the Southeast, Midwest, and West Coast. Second, US Airways offers an impressive network in small and medium size communities. We view these as great assets that will provide us the opportunity to reach many communities that our customers are not able to access today. Like US Airways, we value service to small and medium size communities and have consistently looked for additional markets that can enhance our entire network.

We are under no illusions that mergers are easy or seamless. We have agreed from the outset to do everything in our power to learn from both the successes and mistakes of those who have gone before us. Many of the most important decisions have already been made. The combined company will build on the great American Airlines brand and our AAdvantage loyalty program. The company will remain headquartered in the Dallas/Fort Worth area, and all hubs in both systems will continue to be hubs in the new American.

Our CEO, Tom Horton, and US Airways' CEO, Doug Parker, will jointly lead both the transition team and the new American as it emerges from bankruptcy. Mr. Parker will be CEO of the new company and Mr. Horton will be Chairman of the Board. I can personally attest that despite the difficult path that got us here today, the spirit of cooperation and determination in both companies is extraordinary.

For reasons that Steve Johnson will outline in greater detail, we believe this transaction will be good not only for our two airlines and employees, but also good for competition and the travelling public.

I know that many Members of Congress are skeptical of promises made in these situations and also concerned about industry concentration. As to the former, we do not intend to make commitments that we cannot keep. And as to the latter, it is clear that this merger does not create a high degree of concentration. Above all, however, I would urge you to consider the facts with which I began my testimony. Nothing has been more damaging for the airline industry, our employees, our customers, and our shareholders than the years of economic turmoil we have experienced.

This transaction will give us the opportunity to become a stronger competitor, one with a degree of financial stability that we have not experienced in many years. We will be a company that is better positioned to deliver for customers and its people. This transaction is unique in that it is endorsed by all of our labor unions and embraced by the management and boards of both companies. We know we have a solemn obligation to implement the transaction with great care and thought. We are eager to do so.

Thank you again for the opportunity to testify today.

Mr. BACHUS. Mr. Johnson.

TESTIMONY OF STEPHEN L. JOHNSON, EXECUTIVE VICE PRESIDENT, CORPORATE AND GOVERNMENT AFFAIRS, US AIRWAYS, INC.

Mr. JOHNSON. Thank you, Chairman Bachus, and Ranking Member Cohen, Chairman Goodlatte, and Ranking Member Conyers. And thanks to the entire Committee for having us here today. It is an honor to testify before the Subcommittee about the merger of American Airlines and US Airways.

The creation of the New American Airlines will be good for competition, good for consumers, and good for choice. Expanding our network for the benefit of our customers, our employees, our shareholders, and our communities is the motivation for bringing these companies together.

Integration of the complementary networks of American Airlines and US Airways will enhance competition in an already highly competitive marketplace. It will also deliver significant benefits to each of those constituencies. Our customers and communities will benefit from more and better service. Our employees will receive improved pay, better benefits, and greatly enhanced job security.

And, Mr. Chairman, I would like to acknowledge the fact that there is about 30 of Gary's and my colleagues here in the room with us today who came to join us for the hearing, and thank them personally for joining us.

Our shareholders will benefit from improved financial stability and from $1 billion of synergies created by the merger. And we are proud that the combination has unprecedented support from our 100,000 employees, the financial markets, and the communities we serve.

The US Airways team has been a leader in delivering exceptional customer service, but we have long recognized that we could do more. Airline passengers have made it clear that what they want are broader networks capable of taking them wherever they want to travel whenever they want to go. By combining the systems of American and US Airways, the New American Airlines will build the network our passengers want, one that will compete vigorously with the networks of Delta and Northwest, and with low-cost carriers like Jet Blue and Southwest.

The passenger benefits of the New American Airlines stem from the complementary nature of our operation. By combining these operations, we add origins, destinations, and hubs to a network with very little duplication. Indeed, out of the nearly 900 domestic routes we will serve, American Airlines and US Airways have only 12 nonstop overlaps.

Also US Airways has historically provided extensive air service to small- and medium-sized communities, and this merger will allow us to extend that focus to the American Airlines system.

Combining these networks also will create new, exciting international opportunities. We will provide thousands of passengers better alternatives with over 1,300 new routes worldwide. In addition, our customers will have the potential to access 130—sorry, have the potential to access over 130 cities around the globe served by American, but not yet served by US Airways, and 62 cities served by US Airways but not yet served by American.

And by adding US Airways to the oneworld global alliance, we will increase competition on international routes by creating attractive opportunities for additional international service to oneworld customers and to US Airways hubs.

Domestic markets will become even more competitive. Although it will be the largest airline in the U.S., the New American Airlines will have less than 25 percent of domestic available seat miles, and will compete against the nationwide networks of Delta with 21 percent and United and Southwest, each with 19 percent. The New American Airlines will also compete against Southwest's significantly lower cost structure and a host of smaller, but fast-growing, lower-cost airlines, including Jet Blue, Spirit, Allegiant, and Virginia America.

Also important, as we increasingly think about competing in a global airline business, the combination of American and US Airways will create a third U.S. airline that can compete successfully with major international airlines in key markets around the world.

The New American Airlines will be a financially stronger company. The US Airways business has been consistently profitable, and the successful restructuring of American will return that business to profitability. And as a result of the combination, we expect to generate over $1 billion in net synergies as we increase revenues from new passengers taking advantage of our broader network and improved service, and reduce costs from scale and the elimination of duplicative systems in management.

That improved financial performance will provide American's bankruptcy creditors with an enhanced opportunity for a full recovery, a result unheard of in airline bankruptcies. And it will create more financial stability in the extremely cyclical airline industry.

That financial stability also will provide very significant benefits to our employees, including better pay and benefits, greatly improved job security, and better opportunity for advancement. Thus, it is not surprising that the merger has generated unprecedented support from employees of both companies, their labor unions, and from the communities in which they live.

Antitrust review of these issues is important, and we are already working with the Justice Department to demonstrate the competitive benefits of this merger. We appreciate the opportunity to address these issues with the Subcommittee today and commit to working with you in your oversight capacity.

We announced the merger only 12 days ago, so there are many issues yet to be resolved, but I will do my best to answer any questions you may have today. Thank you very much.

[The prepared statement of Mr. Johnson follows:]

STATEMENT OF STEPHEN L. JOHNSON
EXECUTIVE VICE PRESIDENT,
CORPORATE AND GOVERNMENT AFFAIRS OF US AIRWAYS, INC.

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

COMPETITION AND BANKRUPTCY IN THE AIRLINE INDUSTRY:
THE PROPOSED MERGER OF AMERICAN AIRLINES AND US AIRWAYS

FEBRUARY 26, 2013

Good morning, Chairman Bachus, Ranking Member Cohen, and members of the Subcommittee. Thank you for the opportunity today to discuss the proposed merger between American Airlines and US Airways, which we are confident will create the world's best airline. My name is Stephen L. Johnson and I am Executive Vice President, Corporate and Government Affairs at US Airways. Our 32,000 employees operate over 3,000 flights per day that connect about 80 million passengers annually to more than 200 communities throughout the United States, Canada, Mexico, Europe, the Middle East, the Caribbean, and Central and South America. US Airways operates hubs in Charlotte, North Carolina; Philadelphia, Pennsylvania; Phoenix, Arizona; and here in Washington, DC.

Through the tireless efforts of our employees, US Airways has built a record of operational excellence serving our customers with superior on-time performance, completion rates and baggage handling. But for some time our customers have been telling us they want more: a broader network that can take them to more places, more efficiently. In response to that demand, America West Airlines merged with US Airways in 2005 and US Airways attempted to merge with Delta in 2007 and then United in 2010. In response to demand from their customers, Delta eventually merged with Northwest and United merged with Continental to create larger, more ubiquitous networks for the benefit of passengers, thereby creating a significant advantage versus the smaller networks of American and US Airways. Southwest responded to the same consumer demand when it acquired AirTran. All three transactions were cleared by the Justice Department because those combinations created substantial passenger benefits with minimal competitive overlap.

The combination of the complementary operations of American Airlines and US Airways will create a world-class global network offering consumers more choices to fly where they want, when they want, than either of us can offer separately. By providing our customers with a broader network, more choices and better service, the combination of American and US Airways will give passengers a stronger competitive alternative to Delta/Northwest and United/Continental and allow us to compete successfully with low cost airlines like Southwest/AirTran, JetBlue and others. We expect to maintain all of our existing hubs and

service destinations enabling the New American Airlines to offer more than 6,700 flights daily and provide consumers access to 336 destinations in 56 countries. The combination will generate substantial net synergies and establish the financial foundation for a more stable company and better opportunities for our 100,000 employees.

Support for this combination from our customers, our employees, and the communities we serve is unprecedented. We are particularly gratified by the outpouring of support from our employees and the labor unions at both American Airlines and US Airways who recognize what the New American Airlines means for the futures of employees and their families. Several of the unions have submitted statements for the record in this hearing and I encourage the Subcommittee to look carefully at what they have to say. Importantly, support for the merger also comes from the Unsecured Creditors Committee in the American Airlines bankruptcy proceeding, which includes the Pension Benefit Guaranty Corporation (PBGC), labor interests and other unsecured creditors.

The Transaction Puts the Combined Company on the Path to Success

As Mr. Kennedy explained in his testimony, the combined company will operate under the iconic American Airlines brand and will maintain its headquarters in Dallas-Fort Worth with a significant corporate and operational presence in Phoenix. Ownership will be split 72%/28% between current American stakeholders and US Airways shareholders. The board of directors will be drawn from the creditor representatives and the current boards of American and US Airways. Tom Horton, the current Chairman and Chief Executive Officer of American, will stay on as Chairman of the combined company through the first annual meeting of shareholders. Doug Parker, the current Chairman and Chief Executive Officer of US Airways, will serve as Chief Executive Officer and as a member of the Board of Directors. Mr. Parker will assume the additional position of Chairman of the Board following the conclusion of Mr. Horton's service. The remainder of the executive team will be drawn from the best of both teams.

The merger remains subject to regulatory review and approval of the court overseeing the American bankruptcy proceeding. We expect to able to complete this process in the third quarter

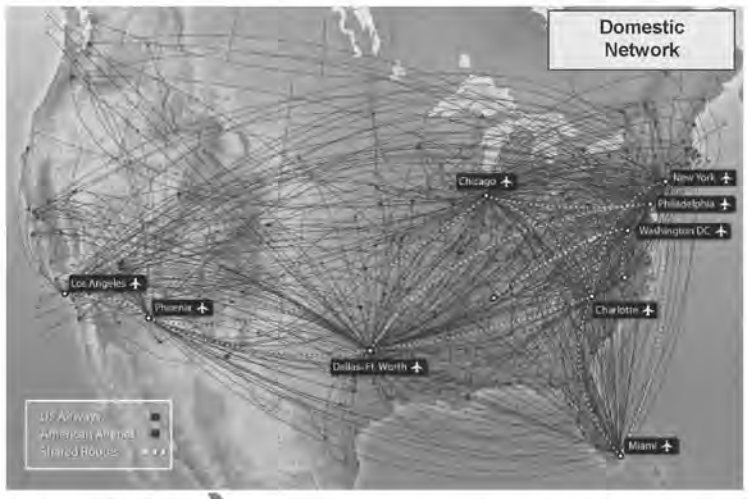
of this year. When we do, it will be the culmination of one of the most successful bankruptcy reorganizations in history, one that has secured better pay for our employees, an enhanced opportunity for full recovery for American creditors, and a distribution to American equity holders.

The New American Airlines Will Benefit Consumers

More than ever, consumers want the ability to reach a broad range of destinations, whenever they want, on one airline system. Because of the limited size and scope of their respective networks, neither American Airlines nor US Airways is able to respond fully to that demand and both operate at a competitive disadvantage to the larger networks of Delta Air Lines and United Airlines. The merger will join two highly complementary networks across the globe, filling critical competitive service gaps for each airline, and create a better and more competitive alternative to Delta and United.

A broader airline network is better for passengers because it gives them more choices, a wider variety of services, and more competition on more routes. The network is able to provide these choices and services because it aggregates demand that independently cannot support profitable air service but collectively can do so. To illustrate this point, consider a world in which an airline operates only aircraft of 50 seats. If an origin city had 50 people who wanted to travel but among them wanted to go to five different cities, it is unlikely they could be served by the airline absent extraordinarily high prices because airlines cannot operate flights profitably where 80% of their seats are empty. But if this airline built a network with a hub serving the origin city and four other cities with comparable demand, as well as the five cities to which those originating passengers want to travel, the airline could fly full planes and expect to earn a reasonable return in doing so. Adding more origins, destinations, and hubs has an exponential effect on the number of possible routings served by a network, the number of passengers that can be served, and the ways that they can be served. It is these benefits which we seek to provide to passengers by combining the complementary networks and nine hubs of American and US Airways.

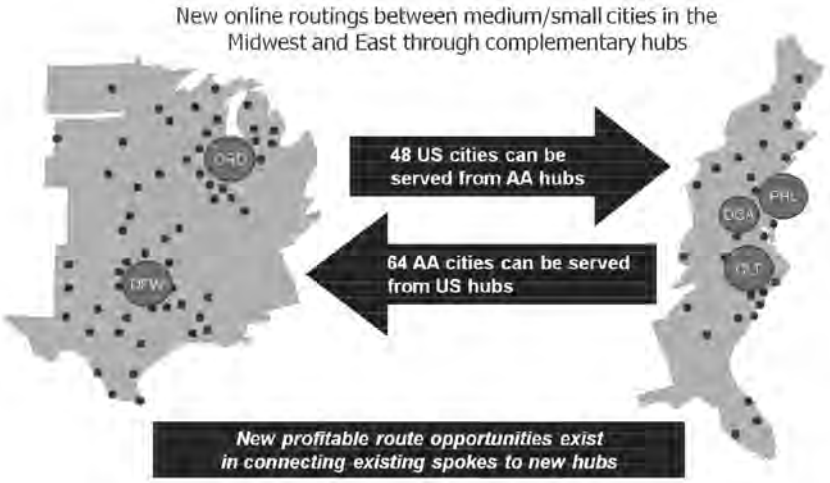
Figure 1: The Domestic Networks of American Airlines and US Airways are Highly Complementary, Resulting in Improved Coverage Throughout the U.S.



American Airlines U·S AIRWAYS

System wide, American Airlines serves 130 cities not served by US Airways, 48 of which are within the United States. Similarly, US Airways serves 62 cities not served by American Airlines, 48 of which are within the United States. By linking these destinations through our hub airports, the New American Airlines will give passengers new and improved online connecting options to get to the places they want to go, when they want to go. The result will be an airline that will have the most service across the Eastern and Central regions of the United States, and an expanded presence and stronger network in the Western United States.

Figure 2: The Merger Enables New Domestic Routings



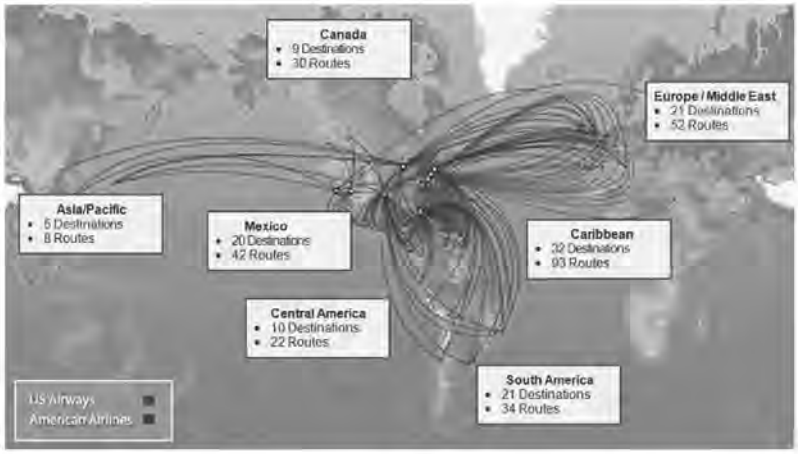
US Airways has historically provided extensive air service to small and medium communities and the merger will allow us to extend that focus to the American Airlines system. Many of the new online connections created by the merger of American and US Airways involve smaller communities. The broader network created by the merger will give us the ability to bring heightened levels of service to those communities that neither of us could afford to provide on our own. The number of passengers benefitting from this combination will grow exponentially as larger communities receive new online connecting service. To illustrate the effect of the superior combined network, even if you focus only on airports with more than 50 departures per week, the merger will create over 1,300 new online connecting routes benefitting millions of passengers.

Figure 3: The Merger Will Connect Several New Cities

Examples of New Domestic Online Routes	
US Airways-Served Airports	AA-Served Airports
Asheville, NC	Cedar Rapids/Iowa City, IA
Augusta, GA	Colorado Springs, CO
Fayetteville, NC	Fargo, ND
Jacksonville, NC	Jackson, WY
New Bern, NC	La Crosse, WI
Newport News/Williamsburg, VA	Madison (Dane County), WI
Roanoke, VA	Rapid City (Regional), SD
Tri-Cities Regional, TN	Rochester, MN
Wilmington, NC	Sioux Falls, SD
Yuma, AZ	Wausau (Central), WI

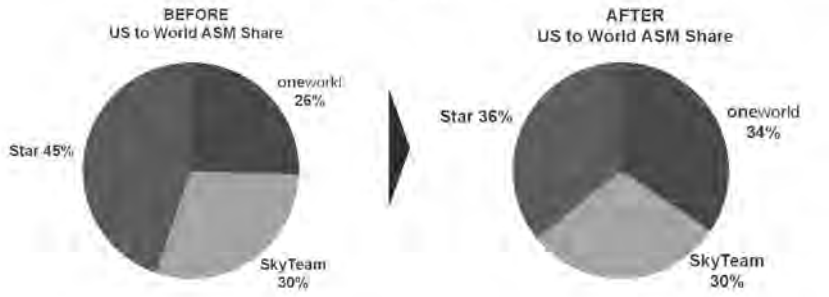
The combination of American Airlines and US Airways is also expected to offer service to 21 destinations in Europe and the Middle East; deepen its coverage throughout Latin America, providing extensive access between the US Airways network and Central and South America; and create a foundation for expanded transpacific service.

Figure 4: US Airways and American Have Complementary International Flight Networks



The new network will also enhance **one**world as a competitive alternative to other international airline alliances. By adding US Airways and its depth of service to the **one**world alliance, international travelers will have more options. For example, by adding US Airways' hubs at Philadelphia and Charlotte to **one**world, the alliance will have access for the first time to connecting hubs in the Northeastern and Southeastern United States, small and medium sized communities in the Eastern United States will have access to the **one**world network, and East Coast passengers served by US Airways and the **one**world carriers will have greater opportunities for transatlantic travel. The combination of American and US Airways will also provide the foundation for increased transpacific service and a more effective and competitive partnership with the Pacific region **one**world partners. The merger, therefore, will enable **one**world to become a stronger global competitor against the larger Star and SkyTeam alliances.

Figure 5: A Stronger oneworld Enhances Competition among the Largest Airline Alliances



The Merger Will Generate Significant Synergies Leading to Improved Financial Stability

The New American Airlines will be a financially stronger and more stable company. The US Airways business has been consistently profitable and the successful restructuring of American will return that business to profitability.

Additionally, as a result of the combination, we expect to generate over $1 billion in net synergies as we increase revenues from new passengers taking advantage of our broader network and improved service, and reduce costs from scale and the elimination of duplicative systems and management. The broader network's improved schedule and connectivity, along with the redeployment of the combined fleet to better match capacity to customer demand, will generate approximately $900 million in annual network revenue synergies as passengers take advantage of the improved service offering of the New American Airlines. The combination will also generate approximately $550 million in annual cost synergies from scale improvements and the elimination of duplicative systems and management. This improved financial performance will enable the combined company to implement initiatives that will improve travelers' experience

and comfort, such as American Airlines' landmark agreements with Airbus and Boeing for the purchase of more than 600 new aircraft.

The merger will require one-time transition-related costs of $1.2 billion, which will be spread over the next three years, and include costs for integrating our respective information technology platforms; harmonizing the interiors of our aircraft, livery, airports, and lounges; and obtaining a single operating certificate. These onetime costs are further evidence of our commitment to building the premier airline network in the world.

The Merger Provides Financial Security for Employees

As Mr. Kennedy described in more detail in his testimony, rising costs of fuel, the lingering effects of terrorist attacks, and the recent economic recession have created economic challenges for all airlines, which the industry's employees have been forced to weather as well. Unfortunately, the employees of American and US Airways have not been spared. Through it all, our employees' dedication to service has not wavered, and we are proud of their efforts to provide safe, reliable, on-time air service to the traveling public.

The merger would not be possible without the hard work of our employees and we would not be here today without our employees' and their unions' support for the merger. The financial stability of the combined company will also provide very significant benefits to our employees including better pay and benefits and a path to compensation that is equal to that of their counterparts at Delta and United; more jobs and greatly improved job security; and better opportunities for advancement.

The New American Airlines Will Enhance, Not Limit, Competition

Competition in the Airline Industry is Intense

Competition in the airline industry has never been more intense. Through recent mergers, United/Continental, Delta/Northwest and Southwest/AirTran have developed and expanded their networks in a quest to deliver passengers what they want. Because of the network effect I described earlier, they provide more choices and better service for passengers today than they did before their mergers.

Although it will become the largest airline in the United States, the New American Airlines will have only 23 percent of domestic available seats miles (an industry measure of capacity). Put another way, over 75 percent of the domestic airline capacity is outside of our control. We will compete against the nationwide networks of Delta with 20 percent share, United with 18 percent and Southwest with 18 percent. Each of these carriers has a head start over us in building a better network and each comes to passengers with different legacy investments, different strengths and different service offerings. Our success will be measured by passengers who move off their system on to ours as we offer more options and better service. But we fully expect those airlines will continue to improve their service and try to retain those customers. That is what competition is about.

Figure 6: National Shares of Domestic Airlines by ASMs

Carrier(s)	ASMs (000s)	Share of ASMs
Delta	2,881,554	20.9%
United	2,592,523	18.8%
Southwest	2,564,982	18.6%
American	2,029,668	14.7%
US Airways	1,349,538	9.8%
JetBlue	701,806	5.1%
Alaska Airlines	538,994	3.9%
Frontier	258,031	1.9%
Virgin America	246,265	1.8%
Hawaiian Airlines	212,701	1.5%
Spirit	200,785	1.5%
Allegiant	136,833	1.0%
Other	82,789	0.6%
Total	13,796,470	100.0%
US/AA	3,379,206	24.5%

The New American Airlines will also compete against a host of smaller, but lower cost airlines, including JetBlue, Spirit, Alaska, Frontier, Allegiant and Virgin America. Low cost carriers (LCCs), whether national in scope like Southwest or more regional in scope like JetBlue and others, have continued to refine their business models and exert significant competitive pressure. LCCs have also diversified their services to attract corporate travelers, offering preferred boarding and seating. Southwest, for example, has grown rapidly from a regional player to become the third largest carrier in the U.S. It employs about 46,000 employees and operates more than 3,500 flights daily on a fleet of nearly 700 aircraft, which serve more than 100 million customers annually. Through its acquisition of AirTran, it has extended its competition with the network carriers by now offering service to many Caribbean and Latin American countries. Southwest has become a formidable force in the industry, and other LCCs are emulating their practices with success.

These forces are here to stay and ensure that air travel will remain competitive.

The Transaction Will Not Adversely Impact Competition

The merger will better position the combined airline to compete in this dynamic marketplace, but not at the expense of competition. The New American Airlines is expected to offer more than 6,700 flights daily to more than 330 destinations in over 50 countries. Across this vast array of routes and combinations, US Airways and American Airlines overlap on only 12 non-stop airport-to-airport routes or 17 non-stop city-to-city routes. With the expiration next year of the Wright Amendment, which currently limits flying out of Dallas Love Field, nonstop competition from LCCs and other airlines is already present or will soon be added on all airport pair overlaps.

The limited number of these overlaps compares favorably with the three most recent large airline mergers—Delta/Northwest (2008), United/Continental (2010) and Southwest/AirTran (2011)—each of which was cleared after Justice Department antitrust review.

Figure 7: Comparison of Domestic Overlaps in Recent Airline Mergers

Measure	Delta/Northwest (2008)	United/Continental (2010)	Southwest/ AirTran (2011)	US Airways / American Airlines (2013)
Non-Stop Airport-to-Airport Overlapping Routes	11	13	23	12
Non-Stop City-to-City Overlapping Routes	13	14	24	17

Overlaps are based on 5+ roundtrips per week.
Source: OAG data.

The same is true internationally—US Airways and American have *zero* overlapping non-stop flights. In addition, among American's immunized partners, US Airways has only one non-stop overlap on international flights. In sum, regardless of how competition may be measured, this is a merger of highly complementary operations in a highly competitive marketplace. Indeed, it is because our operations are so complementary and overlap so little that the combination of American Airlines and US Airways delivers the powerful passenger benefits that I described earlier.

Conclusion

The creation of the New American Airlines will be good for competition, consumers and choice. Expanding our network for the benefit of our customers, our employees, our shareholders and our communities was the motivation for bringing these companies together. Integration of the complementary service of American Airlines and US Airways will enhance competition in what are already vigorously competitive markets and, in doing so, significantly benefit each of these constituencies. Passengers and communities will benefit from more and better service, and more competition. Employees will receive improved pay, benefits and job security. Our shareholders will benefit from the improved financial stability of the combined company. The ability to deliver these benefits is why the combination has attracted unprecedented support from both airlines' labor unions, our 100,000 employees, the financial markets and the communities we serve.

We look forward to continuing our discussion about the benefits of this merger and sharing our vision for creating the world's best airline. Thank you.

Mr. BACHUS. Thank you.
Mr. Mitchell.

TESTIMONY OF KEVIN MITCHELL, CHAIRMAN, BUSINESS TRAVEL COALITION (BTC)

Mr. MITCHELL. Thank you. Mr. Chairman and Members of the Committee, this morning I am going to explain one threat to price transparency that would be enabled by this merger that has been agreed to by airlines, but has not yet caught the eye of the public.

I am also presenting this testimony this morning on behalf of the American Antitrust Institute.

In 2008, I warned this and other Committees in testimony of the dangers of the then proposed Delta/Northwest merger and what those dangers would hold for consumers. And I remember well that Northwest CEO, Doug Steenland, testified that Committee Members should not be concerned because the market disciplining effect of third party distributors, such as Expedia, is so pervasive and so important that they create this transparency, he said, that will keep prices low. He used this transparency, in fact, to justify the merger, and he was right back then about the effects of transparency.

Today, however, airlines, including American and US Airways, have agreed on a brazen new worldwide business model for how to price and sell tickets. It is designed to destroy price transparency, which is the very antidote to consolidation needed to ensure a healthy marketplace. The model is called new distribution capability, or NDC, and the airlines trade group, IATA, is spearheading implementation.

NDC is designed to terminate, by agreement among competitors, the current transparent model for the pricing of tickets where fares are published and publicly available for comparison shopping and purchase by all consumers on a non-discriminatory basis.

What problem are the airlines endeavoring to solve? IATA has decried publicly the commoditization of airline services caused by low fare search capabilities of the very online travel agencies that Mr. Steenland lauded. For example, Tony Tyler, Director General of IATA, stated in a press interview remarkably, and I quote, "We've done a great job of improving efficiency and bringing down costs, but we've handed that benefit straight to our customers. As soon as someone has got a cost advantage, instead of charging the same price and making a bit of profit, they use it to undercut their competitors and hand the value straight to passengers or cargo shippers, and you've got to ask why," says Tyler. "I think one of the reasons is the way we sell our product. It forces us to commoditize ourselves," end quote.

How does an NDC work? A binding resolution codifies that airlines have agreed that they have the right to demand from consumers, before they would be privileged to receive a fair quote, personal information, including name, age, nationality, contact details, frequent flyer numbers of all carriers, whether the purpose of the trip is business or leisure, prior shopping purchase and travel history, and of all things, marital status

Why is this program so toxic? Air fares would no longer be publicly filed and available on a non-discriminatory basis for consumers to anonymously comparison shop and purchase through travel agencies. Instead, each price would be unique depending on the profile of the consumer. This personal information can be used to extract higher prices from less price sensitive travelers, such as business travelers.

In contrast, today when a consumer wants to travel from A to B, she can go to a travel agency that has the fares and schedules. All options in the marketplace are returned so she could easily compare prices without having to divulge personal information. It

is this very price visibility that has checked the power of airlines to raise fares lest they lose out to competitors offering a better deal.

Price transparency is even more important today because when Steenland testified there were six network carriers, then there were five, then there were four. Now we are heading to 33. By eliminating transparencies, airlines will have created by concerted actions a new system of completely opaque pricing, and with it the ability to raise all fares across all systems.

The nexus between NDC and this merger, this merger eliminates US Airways, a maverick on airline distribution issues. It will be far easier to coordinate expressly or tacitly among three network competitors, and far easier to impose this model, especially given the clout that the New American Airlines would have as the biggest carrier on the planet.

The lack of transparency created by NDC further cements the dominance of these mega carriers. And once NDC is established here in the world's largest market, it is going to be lights out, game over for consumers.

Two remedies. DoT has the authority to approve NDC. Given its anti-competitive effects and unprecedented invasion of privacy, DoT should reject it without condition.

Number two, DoJ. They should serve IATA and its members who have been spearheading the NDC scheme with a CID to discover the purpose and objectives of NDC and the process by which horizontal competitors reached a binding agreement on how they would price and sell tickets.

Thank you, Mr. Chairman. And I would just like to add that the American Antitrust Institute is looking at the competitive effects of NDC itself.

[The prepared statement of Mr. Mitchell follows:]

Testimony of Kevin Mitchell

Chairman

Business Travel Coalition

Before the U.S. House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Regarding The Proposed American Airlines - US Airways Merger

February 26, 2013

Business Travel Coalition - 214 Grouse Lane, Radnor, PA 19087

610-999-9247 * BTC.travel

TABLE OF CONTENTS

I. INTRODUCTION

Mr. Chairman and Members of the Committee thank you for requesting that Business Travel Coalition (BTC) appear before you today to represent the interests of the managed-travel community and consumers on the subject of a potential American-US Airways merger. The consequences of airline mergers for the national economy and consumers must be carefully and deliberately examined. BTC applauds this Committee for taking this early and important oversight step. The American Antitrust Institute (AAI) and BTC jointly produced a White Paper on this potential merger and it is appended to this statement.[1]

From a consumer standpoint – *individual traveler or corporate travel department* - there are few benefits to offset the negative impacts of this proposed merger that include reduced competition, higher fares and fees and diminished service to small and mid-size communities. To be clear, there is benefit in a financially viable air transportation system. However, previous mergers have already enabled seat capacity cuts, higher fares and billions of dollars in fees for ancillary services resulting in a financially strengthening industry. As such, consumer harms from this merger are exacerbated, as there are no substantial countervailing consumer benefits.

II. BACKGROUND

A. The Right Regulatory Review Construct

Industry observers who suggest a smooth ride through regulatory airspace point to previous mega merger approvals, relatively few overlapping routes and the need for these firms to be able to compete more effectively against giants Delta Air Lines and United Continental. However, Alison Smith, an antitrust lawyer at McDermott Will & Emery LLP in Houston, and a previous official in the Department of Justice's (DOJ) antitrust division, stated it well when on February 10, 2013 *The Wall Street Journal* paraphrased her analysis: "The key question is whether regulators believe the airline industry already is sufficiently concentrated."[2]

Indeed, Congress must insist that the U.S. Department of Transportation (DOT) and DOJ not merely focus on the proposed merger as a standalone transaction with its associated route overlaps. Rather, the analysis should include implications for the competitive structure of the industry, i.e. the future of airline competition, airfare transparency, comparison-shopping, personal data privacy and consumer protections.

B. Horizontal Airline Competitors Colluding On Business Rules

Importantly, Congress needs to call on DOJ to examine the anti-competitive and anti-consumer direction increasingly powerful mega airlines and antitrust-immunized global alliances seek to take the industry in with respect to collusion on business rules. The International Air Transport Association (IATA) - the trade association for 240 airlines across the globe – has developed and is moving into a testing phase for a new worldwide business model designed (in its own words) to substantially eliminate price competition by reducing airfare and ancillary fee transparency and comparison

shopping for consumers and corporate travel departments. This testimony will endeavor to illuminate the important nexus between the proposed merger and the implementation of IATA's so-called New Distribution Capability (NDC).

C. No Failing Firms Here

Airline mergers are generally reviewed by the DOJ and DOT. The DOJ has authority to block a merger even if it is approved by the DOT. The "failing firm" defense under the Department of Justice/Federal Trade Commission (FTC) HORIZONTAL MERGER GUIDELINES (GUIDELINES) provides a safe harbor if "...a merger [is] not likely to enhance market power if imminent failure...of one of the merging firms would cause the assets of that firm to exit the relevant market."[3] "Imminent" failure of a firm under the GUIDELINES is defined by specific criteria, including: the inability of a failing firm to meet its financial obligations in the near future or to reorganize successfully in Chapter 11, and a demonstration of good-faith efforts to garner offers that would keep the firm's assets in the market.[4]

Based on the GUIDELINES' criteria, it is clear that the failure of American is not imminent, even though American is in bankruptcy.[5] Indeed, there are few examples of major U.S. airlines not emerging successfully from bankruptcy. For example, Trans World Airlines declared bankruptcy on three separate occasions over almost a decade.[6] The carrier's final bankruptcy filing in 2001 ended in a merger with American. Similarly, the bankruptcy of America West resulted in a merger with US Airways in 2005, a deal that went unchallenged by the DOJ.[7]

III. THE PROMISE OF INCREASED EFFICIENCIES

A. Merger-Related Cost Savings Are Controversial

Claimed efficiencies from airline mergers can be a powerful defense for an otherwise anticompetitive merger. After a six-month investigation into the Delta-Northwest transaction, for example, the DOJ concluded that the merger "is likely to produce substantial and credible efficiencies that will benefit U.S. consumers and is not likely to substantially lessen competition."[8] The agency counted as efficiencies those relating to cost savings in airport operations, information technology, supply chain economics, fleet optimization and service improvements related to combining complementary networks.

Merger-related cost savings are a controversial subject. The economic literature has hosted an ongoing debate over issues relating to the tension between network size versus economies of scale and density, and efficiencies versus market power effects. This includes empirical economic work showing that efficiencies dwindle as networks increase in size and the effects of increased "hubbing" on congestion and costs materialize.[9] As mergers become larger, the bar is raised on carriers to demonstrate to the DOJ that claimed efficiencies are substantial enough to overcome correspondingly large anticompetitive effects.[10]

An increasingly important factor in the efficiencies debate is post-merger integration. It is now clear that integration of major airlines presents significant hurdles. Protracted and unwieldy system integration scenarios can impose costs on the merged company that are passed on to customers in the form of inconvenience, flight delays, and even litigation involving contested issues. For example, US Airways-America West, Delta-Northwest, and United-Continental all experienced systems integration problems,[11] ranging from integrating computer systems, combining frequent flier programs and meshing work forces to problems with cockpit standardization.

Based on accumulating evidence that post-merger integration problems are significant, there is a case to be made that future airline mergers could follow suit. Moreover, the costs associated with integration are probably underestimated when the merger is proposed and can skew an analysis of efficiencies benefits. One way to correct for this is for antitrust enforcers to discount the magnitude of claimed efficiencies at the time of merger review. This is an especially important consideration in light of the GUIDELINES inherent balancing of anticompetitive effects against claimed efficiencies.

B. Need To Forensically Analyze Past Merger Projections, Promises and Outcomes

Advocates of airline mergers will undoubtedly cite recent improved financial performance as evidence that mergers have proved up the cost savings. Before such claims are accepted, however, it is important to note that high profits may indicate any number of developments. One is that carriers have in fact realized claimed efficiencies. Alternatively, higher profits may be the result of higher fares achieved through the exercise of market power, or the express or tacit agreement among competitors to withhold ancillary fee information from consumers necessary for efficient comparison shopping and purchasing of the complete air travel product.

A thorough post-mortem analysis of airline efficiencies that disaggregates these, and other potential merger-related reasons for higher post-merger profits, is badly needed. Such a forensic analysis of projections, promises and outcomes would also account for how successive airline mergers increase the probability that the merged carrier can externalize integration problems to captive customers without facing the threat of lost market share from defections to a dwindling number of rivals.[12]

IV. WHAT MERGERS ARE UNLIKELY TO RAISE ANTITRUST ENFORCEMENT OBSTACLES?

A. Analyses Often Too Simplified

One of the few examples of a merger that failed to obtain antitrust clearance is United-US Airways (2000-2001). In that case, the DOJ's major concerns centered on loss of choice, potentially higher fares, and lower quality of service. The merger would have yielded a monopoly or duopoly on nonstop service on over 30 routes and "solidify[ied] control" by the merging airlines over major connecting hubs for east coast traffic.[13] The DOJ rejected a proposed remedy by the parties, including a divesture of assets at Washington D.C. Reagan National airport and a promise by American to fly five of the routes that would be adversely affected by the merger.

With few challenged airline mergers to evaluate, industry analysts and observers often opine on the legality of airline mergers based on fact patterns across mergers that antitrust enforcers did not attempt to block. For example, both Delta-Northwest and United-Continental involved multiple overlap routes, many of which involved 2-1 and 3-2 routes. Yet in contrast to United-US Airways, both deals went through, raising the question: How many overlap routes on which competition is substantially lessened should be enough to raise antitrust enforcement eyebrows? Given the fact pattern surrounding overlap routes in unchallenged mergers, one could deduce that the DOJ will look past problematic overlap routes if there is a modicum of rivalry from LCCs and legacies and the affected airports are not slot-constrained. As noted earlier, an efficiencies defense also appears to carry significant weight.

B. Lessons From The Delta-Northwest And United-Continental Mergers

There are a limited number of economic studies of airline mergers that examine post-merger price, output and quality measures to determine if mergers are largely pro-competitive or anticompetitive. Increasingly, antitrust enforcement emphasizes the value of direct evidence of anticompetitive effects – including natural experiments and analysis of consummated mergers – in guiding future enforcement decision-making.[14] Both tools attempt to make the most use of actual, relevant events in evaluating prospective mergers, including evidence of adverse effects (e.g., post-merger price increases) and entry and exit, particularly in markets similar to those affected by a proposed transaction.

The proposed American-US Airways transaction presents a unique opportunity for the DOJ to analyze evidence on previous airline mergers. Indeed, it would be poor competition policy to undertake an antitrust analysis of the proposed merger without evaluating the effects of prior airline mergers.

V. THE DIMINISHING INFLUENCE OF LOW COST CARRIERS

Low cost carriers (LCCs) cannot be relied upon to save the day for legacy mergers that present sizable competitive issues. The dwindling stock of LCCs and their exposure as potential takeover targets – particularly in light of the Southwest-AirTran merger – makes them increasingly unreliable as a source of competitive discipline in the industry. Pre- to post-merger fare increases on Delta-Northwest and United-Continental routes highlight the challenges that smaller, lower-cost rivals face on hub-to-hub routes dominated by legacy carriers. Increasingly concentrated hubs resulting from previous legacy mergers raise further barriers to LCC entry that could potentially discipline adverse effects.

VI. THE PROBLEM OF MONOPSONY POWER

Consolidation in the domestic industry has produced three large airline systems from six airlines in four years' time (Delta, United Continental, and Southwest). The proposed merger of American and US Airways would eliminate yet another airline to

produce four mega-carrier systems. Another merger of major carriers should begin to raise questions, as described in the GUIDELINES, about the effect of the transaction on the carriers' buying market power. The proposed American-US Airways merger raises two potential sources of concern.

One monopsony issue is that a merged American-US Airways, as the largest carrier in the U.S., could wield significantly more buyer power than each carrier does independently. As a result, the merger could – as the GUIDELINES describe – reduce the number of "attractive outlets for their [suppliers'] goods or services."[15] Airlines are significant purchasers of goods and services from sellers in complementary markets. These suppliers include: travel agencies, travel management companies, airports, distribution systems, parts suppliers and caterers. Such suppliers are far less powerful and dispersed relative to the airline buyers with which they do business. As a result, they lack the bargaining power necessary to balance the buyer power potentially exercised by the merged carrier. The merger could therefore result in suppliers being squeezed by below-competitive prices paid for their goods and services.

A second source of concern surrounding monopsony power relates to the role American and US Airways in global airline alliances. Because American and US Airways are currently in different global alliances, and one carrier would switch alliance membership, an important by-product of the merger would be a reconfiguration of the international alliances landscape. Given American's protracted and controversial efforts to obtain antitrust immunity for its participation in the oneworld alliance, it is more probable that US Airways would defect from the Star alliance to join oneworld.

Global antitrust immunized airline alliances are already powerful buying groups that exert market power over various suppliers. The merger of American and US Airways (conformed within one alliance) could produce a larger oneworld alliance vis-à-vis a more disparate set of suppliers. Similar to the argument regarding the merging carriers themselves, the monopsony concern in the global alliance context arises because the merged carrier could create a more powerful oneworld alliance group buyer. An antitrust investigation into the proposed merger of American and US Airways should frame the question of how the proposed merger could affect the incentive and ability of the larger oneworld alliance to adversely affect prices paid to the various alliance suppliers by driving them below competitive levels.

The likelihood of monopsony effects that might result from the proposed merger is difficult to predict without information from the suppliers who themselves do business with the airlines and with global airline alliances. Specifically, it will be important for the DOJ to understand how suppliers' bargaining power could be affected by a combined American-US Airways and a larger and potentially more powerful oneworld alliance.

VII. THE LACK OF ANCILLARY FEE INFORMATION EXACERBATED

Price transparency is vitally important for the competitive process to function properly.[16] However, the latest round of airline industry consolidation has been

accompanied by carriers aggressively unbundling their products (e.g., checked baggage, advance boarding, preferred seating, etc.) and charging fees for services previously included and paid for by consumers in the price of their tickets. While unbundling is generally pro-competitive, it is unlikely to be beneficial without transparency in prices that is typically intended to accompany it. Indeed, airlines have been increasingly able – without competitive repercussions – to ignore the demand for ancillary fee data even from their largest, most sophisticated customers.[17] Moreover, airlines have inadequately responded to the concerns of Congress and the DOT over lack of transparency and purchasability of ancillary fees.[18]

The obvious struggle within the domestic airline industry over unbundling and price transparency is a conflict that presents an important "cross-over" issue between consumer protection and antitrust. For example, in eschewing true price transparency, airlines increasingly mask the all-in price of air travel, with two major adverse effects. First, lack of price transparency prevents consumers from efficient comparison-shopping of air travel offerings across multiple airlines – a hallmark of U.S. airline industry deregulation. A second consequence of the deterioration in price disclosure is that ancillary fees go largely undisciplined by market forces. Likewise, base fares are today not exposed to the full discipline of the marketplace and represent unreliable comparative benchmarks for consumers and regulators alike because some fares contain specific services that others do not. Arguably, to the extent that airlines are in a commodity business, it is to their advantage to attempt to differentiate themselves by making meaningful price comparisons difficult.

The question for an antitrust investigation of a proposed merger of American and US Airways is whether the combination could dampen the merged carriers' incentive to disclose ancillary fee information to consumers. If so, such an adverse outcome could represent a cognizable adverse effect of the merger. Arguably, as airlines have grown larger and more powerful relative to consumers through consolidation, carriers have increasingly been able to refuse to provide consumers with so-called ancillary services and associated fees information. This supports the notion that rivalry creates incentives for sellers to fully inform consumers about the pricing, quality and availability of their products. A loss of competition through merger therefore diminishes those incentives, particularly in cases such as American-US Airways where the combination results in extremely high levels of concentration.

It will be important for the DOJ to determine if and how a merger of American and US Airways – a transaction that would create the largest airline in the U.S. – could alter the ability and incentive for the merged carrier to disclose ancillary fee information differently than before the merger. The mechanism for this may be that with fewer players in the market, the need for sellers to reach agreement on matters such as how to deal with baggage fees is minimized because it can be handled by the airlines "tacitly." Curbing or preventing such behavior is one of the major purposes of the antitrust laws, particularly merger control.

VIII. COORDINATED EFFECTS A BIG PROBLEM

When there were eight network carriers, regulatory focus on route overlap and reduced competition in individual markets made sense. However, when the number of network competitors is cut in half, and headed for three, explicit or tacit agreements on market actions such as across-the-board fare or ancillary fee increases are made infinitely more achievable and take on far more importance than route overlaps. Furthermore, four network competitors since 2008, when radical industry consolidation began, have been able to dismiss in lockstep their best corporate customers' demands for ancillary fee information, e.g., for checked bags. This is a clear sign that the market for commercial air transportation services is failing, and given this circumstance, how could prudent public policy suggest further consolidation of this industry?

This concern about competitor agreements is called "coordinated effects" in the U.S. and "collective dominance" in the EU and has been at the core of U.S. merger policy for some time. In 1986, for example, Judge Richard Posner wrote that the "ultimate issue" in reviewing a merger under the antitrust laws is "whether the challenged acquisition is likely to hurt consumers, as by making it easier for the firms in a market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level."[19]

IX. THE ANTI-CONSUMER ELEPHANT IN THE ROOM

A. IATA's NDC Is An Agreement Among Horizontal Airline Competitors That Raises Significant Antitrust And Privacy Law Issues

Mega U.S. and international airlines and their antitrust-immunized global alliances have used IATA as the vehicle to reach an agreement establishing a new industry-wide business model for the pricing and selling of air transportation services. This new model would apply to travel to and from, and within the United States, and in fact, air transportation services across the globe.

This proposed new business model, agreed by IATA member airlines at a conference held on October 19, 2012 as Resolution 787, would negatively and significantly impact airline competition and would drive up airline prices for consumers.[20] It is designed to terminate by agreement among airline competitors the current market-driven and transparent model for the pricing and sale of tickets, where airfares are published and publicly available for comparison-shopping and purchase by all consumers on a non-discriminatory basis. The airlines themselves have confirmed publicly that the current transparent airfare model has constrained their ability to raise airfares.

This new business model would also violate the privacy rights of consumers. Under Resolution 787 the airlines have agreed among themselves that they have the right to demand that extraordinarily intrusive personal data about specific consumers be broadcast to all airlines that might offer service, even though consumers in most cases enter into a contract of carriage with just one of those airlines. Resolution 787 on its face (Section 3.1.1) explicitly says that before they quote prices for a consumer the

airlines have the right to demand from consumers personal information that "includes but is not limited to" the customer's: name, age, marital status, nationality, contact details [including email address], frequent flyer numbers [on all carriers], prior shopping, purchase and travel history, and whether the purpose of the customer's trip is business or leisure. Unless all NDC airlines were to adopt a common privacy policy, which is exceedingly unlikely, then consumer information would be sent to airlines prior to consumers having had the opportunity to review individual airlines' privacy policies.

B. The Details About NDC

Because the proponent airlines of NDC and IATA chose to incorporate this new business model in an IATA Resolution as opposed to an IATA Recommended Practice, under IATA's governing rules, this new business model is an agreement that is binding on all of the roughly 240 IATA-member airlines worldwide. As set forth in the preamble of this Resolution, all IATA airlines that choose to distribute "enhanced content" (an undefined term but overtly one that means when an "ancillary service" such as checked luggage or pre-reserved seating is sold along with the base fare) across "multiple channels" would be obliged to adhere to this new business model, and to do so both with respect to sales made by intermediaries (that is, travel agencies) and those made in their direct sales channels, such as via their websites.

For carriers adopting NDC for particular markets, airfares and schedules would no longer be publicly filed and available on a non-discriminatory basis for any and all consumers to anonymously comparison shop and then purchase through intermediaries such as brick-and-mortar and online travel agencies, or via their websites. Instead, NDC airlines would create "unique" offers each time a particular consumer requested a fare for a specific route/date. The offers made by each airline would be "customized" based on personal details the airlines have agreed in Resolution 787 they will have the right to demand from consumers before quoting any prices.

The personal information about each specific traveler the airlines have agreed among themselves that they will have the right to demand is quite detailed and intrusive, as explained above. Many of these items of sensitive personal information can be used very effectively to pinpoint, and extract higher prices from, those travelers who are likely to be less price elastic - such as business travelers and travelers whose shopping and travel history demonstrate they do not regard connecting services as viable substitutes for non-stop services on particular routes or do not consider alternate airports serving the same area as substitutes for one another.

Importantly, the airline industry, and IATA in particular, has decried publicly what it describes as the "commoditization" of airline services caused by the low-fare search capabilities on-line and brick-and-mortar travel agencies have made available to consumers, capabilities that only work because of the current system of publicly available and transparent fares. And airlines have done so even as they acknowledged at the same time the benefits for consumers of the current system of

fare transparency. For example, in July 2012, Tony Tyler, the Director General of IATA, just after the NDC project had been officially launched, stated as follows in an interview with Flight Global:

> *"We've done a great job of improving efficiency and bringing down costs, but we've handed that benefit straight to our customers," Tyler says. "As soon as someone's got a cost advantage, instead of charging the same price and making a bit of profit, they use it to undercut their competitors and hand the value straight to passengers or cargo shippers – and you've got to ask why? I think one of the reasons is that the way we sell our product forces us to commoditize ourselves."*[21]

On other occasions as well, airlines have confirmed publicly that this fare transparency and efficient comparison shopping have sharpened price competition among airlines on competitive routes and have forced them to keep their prices low, lest they lose sales to airlines offering more attractive published fares to consumers.

The current distribution system has indeed been responsible for an unprecedented degree of comparison-shopping opportunities for air travelers, who can, with just a few clicks of a mouse, learn in seconds the best priced options on any carrier for their journey.

It might be proper for individual airlines, at least those not holding a dominant position, to unilaterally adopt and pursue distribution business model changes that increased consumer search costs and otherwise undermined the current fare transparency they admit has been a source of significant competitive pricing pressure. However, BTC firmly believes that horizontal competitors (and indeed nearly the entire airline industry) banding together to jointly adopt such a new business model by express agreement crosses the line. In short, BTC believes that NDC is an agreement among competitors that has the purpose and will have the effect of stabilizing or raising prices and thus violates U.S. antitrust laws.

BTC also submits that any ticket distribution system that, like NDC, requires consumers to surrender the types of personally identifiable information spelled out at Section 3.1.1 for the privilege of being quoted a price for travel between points A and B is a flagrant violation of consumers' elementary rights to privacy.[22] The processing of these personal details is not for a legitimate purpose but rather to allow airlines to engage in acutely targeted price discrimination that extracts higher fares from those judged to be less price-sensitive. Further, the data enumerated by the Resolution is excessive in relation to the purpose of quoting airfares for consumers. Airlines, of course, have been quoting prices to consumers for decades and have never before demanded these intrusive details as a condition for being told what the costs of travel would be. In addition, BTC strongly holds the view that none of a person's age, marital status, frequent flyer membership, nationality, shopping, travel and purchase history and whether the purpose of a trip is business or leisure can be a proper basis for price discrimination by an airline.

For example, BTC is convinced that no reasonable person would suggest that it fair or defensible to charge someone 40 years of age more, or less, than someone who is 50. And BTC would strenuously object to any suggestion that those who are married can be favored or penalized in terms of prices relative to those consumers who are not, especially given that a large sector of the American public cannot legally get married.

IATA has stated publicly that testing and adoption of NDC will begin early this year. Thus, NDC may pose an imminent threat of higher prices for consumers of air travel as the competitive discipline that flows from the current regime of published, visible and easily comparable air prices is supplanted with one based on the ultimate in fare shrouding. Under NDC, consumers would be unable to conveniently and easily test what the "market price" for their trips should be as every fare would be "unique" to particular travelers. And consumers could not be confident that they were being quoted offers that were the best deal for them, or even a good one. And NDC will soon violate consumers' rights to privacy on an unprecedented scale.

C. The Consumer Privacy, Pricing and Cost Impacts of NDC

If implemented, NDC would infringe upon consumers' data privacy rights and expectations in unprecedented ways and to extreme levels. Using consumers' data to price discriminate and structurally divide markets, joined up with the elimination of publically available fares, rules, and schedules, would kill off market disciplining forces and enable prices to rise throughout the entire aviation system. Adding insult to injury, all manner of new costs will befall the travel distribution system including travel agencies having to pay for access to airfare, ancillary fee and bundled content. These costs would then be transferred onto the backs of consumers and corporate travel departments in the form of higher transaction or service fees.

D. How IATA Tells The Story

IATA's well-oiled public relations machine is a clever operation; maybe too clever. This is how the organization brought the NDC proposal to the marketplace.

IATA:

1. developed rationale and generated support among airline-members for NDC as an IATA strategic priority and solution to a problem of commoditized pricing that cannot easily be solved by individual airlines in a transparent and competitive marketplace, but that can be remedied through agreement by a group of horizontal competitors;

2. ensured that only airlines would participate in new business-model strategic planning for close to a year before some, but not all, industry stakeholders were convened in July 2012 in Geneva to be informed of the new "direction" the world's airlines were headed in;

3. powered forward with world's most influential airlines and alliances to ensure momentum and initial success in the major global markets;

4. secured a Binding Resolution in October 2012 with 238 yeas and 2 abstentions;

5. labeled NDC as a technical standard when it is really a new industry-wide business model;

6. advertised that personal information would be requested only on an opt-in basis while being silent about non-consent resulting in significant negative consequences for consumers;

7. described personalization and customization as the ultimate in transparency when in fact the objective is price opacity;

8. declared that consumers are demanding personalization when in fact they have been demanding that transparency and comparison shopping be restored; and

9. failed to mention massive new costs that will be ultimately transferred to consumers.

E. The Nexus Between This Merger And NDC

Importantly, the proposed American/US Airways merger, if sanctioned by Washington, would increase the chances of success of IATA's new business model by orders-of-magnitude. Why? US Airways has been a long-time competitive outlier and maverick in content distribution matters.

For example, in 2000 and 2001 when only airline-owned Orbitz had access to airlines' web fares, US Airways was the first to break ranks and offer them to travel agencies and their corporate clients. Likewise, in 2006 when American Airlines took the industry to the brink of airfare content collapse, US Airways was a significant early-mover participant in full-content agreements averting a calamity for corporate travel programs and individual consumers alike.

If American Airlines, a full supporter of NDC, were to swallow maverick US Airways, then the chances that a competitively relevant competitor, in the world's most important aviation market, would reject this over-the-top anti-competitive and anti-consumer IATA initiative, would be dangerously diminished. This represents the über manifestation of the coordinated-effects antitrust problem cited above, i.e. competitors pursuing a market-structure change implicitly understand that they should cooperate, including LCCs that would benefit from rising prices without directly participating.

X. THE REMEDIES

A. Block NDC

Given the obvious anti-competitive effects of NDC, and the unprecedented invasion of privacy it would inflict on all consumers, upon receipt of IATA's application for approval

of Resolution 787, DOT should deny approval of it.

B. Investigate NDC
DOJ should serve IATA, and the airline members of IATA who have been spearheading the NDC scheme with a civil investigative demand (CID) to discover documentation and compel testimony regarding the purpose and objectives of NDC and the process by which horizontal competitors reached a Binding Resolution on a new industry-wide business model.

C. Increase Consumer Protections
In order to address price transparency problems resulting from an imbalance in market power between airlines and consumers, and to address the complete absence of any private right of action for consumers when airlines fail to make clear and timely disclosure of the all-in price of travel, Congress might consider the efficacy of a minimum set of national consumer protections, enforceable at the state level, to protect consumers while avoiding burdening airlines with a patchwork of consumer laws.

XI. CONCLUSION

Whether it is fighting DOT rule makings or boldly proposing NDC, there is a full-throated airline assault on price transparency. The past two mega-airline mergers were justified on the pricing transparency and discipline provided by the online travel agencies and other third party distributors. Now through NDC, airlines are jointly seeking to kill off transparency and comparison-shopping – this at a time when they are needed more than ever as we have gone since 2008 from 6 network carriers to 5, then to 4 and now potentially to 3.

Congress needs to keep its guard up, and intervene as necessary, before consumers are really harmed.

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[1] The White Paper, which has been sent to the U.S. Department of Justice (DOJ), indicates that a merger between Dand American could: substantially reduce competition on a number of routes, create regional strongholds at key airports across the country, and starve smaller communities of important air service. (August 2012), available http://www.businesstravelcoalition.com/press-room/2012/august-8---aai--btc-white.html

[2] *The Wall Street Journal* - U.S. Likely to Clear Airline Deal (February 10, 2013) available http://online.wsj.com/article/SB10001424127887323511804578296221685366486.html

[3] U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES (GUIDELINES), §11 (August 2010), *available* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf

[4] *Id.*

[5] For sure, a combined American Airlines and US Airways would have a bigger competitive footprint to compete with Delta and United Continental, but that's the logic that has brought us to four network

carriers, and if you continue to extend the logic the U.S. would be down to two closed network-carrier systems pretty soon, after one of these mammoth groupings acquires Alaska Airlines, JetBlue Airways and Frontier Airlines. What's more, US Airways and American Airlines are not failing firms. The former is enjoying record profits while that latter is about to exit bankruptcy reorganization with billions of dollars in cash, lower operating costs and new aircraft on order.

[6] History of Airline Bankruptcies, FOXBUSINESS.COM, November 29, 2011, http://www.foxbusiness.com/travel/2011/11/29/history-us-airline-bankruptcies/

[7] Keith L. Alexander, *US Airways To Merge, Move Base To Arizona*, WASHINGTONPOST.COM, May 20, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/05/19/AR2005051901972.html

[8] U.S. Department of Justice, Statement of the Department of Justice's Antitrust Division on its Decision to Close its Investigation of the Merger of Delta Air Lines Inc. and Northwest Airlines Corporation, October 29, 2008, *available at* http://www.justice.gov/atr/public/press_releases/2008/238849.htm.

[9] *See,* e.g., David Gillen, et al., *Airlines Cost Structure and Policy Implications*, 24 J. TRANSP. ECON. AND POL'Y 9 (1990); Michael Creel and Montserat Farell, *Economies of Scale in the US Airline Industry After Deregulation: a Fourier Series Approximation*, 37 TRANSP. RES. PART E 321, 332 (2001); W. M. Swan, *Airline Route Developments: A Review of History*, 8 J. AIR TRANSP. MGMT. 349 (2002). *See also* Subal C. Kumbhakar, *A Reexamination of Returns to Scale, Density and Technical Progress in U.S. Airlines*, 57 S. ECON. J. 428, 439 (1990) and Leonardo J. Basso and Sergio R. Jara-Diaz, *Distinguishing Multiproduct Economies of Scale from Economies of Density on a Fixed-Size Transport Network*, 6 NETWORK & SPATIAL ECON. 149 (2006). Regarding the balance of market power and efficiencies effects, *see e.g.,* E. Han Kim and Vijay Singal, *Mergers and Market Power: Evidence from the Airline Industry*, 83 AM. ECON. REV. 549 (1993).

[10] Perhaps the best example of the imperative for merging parties to show significant efficiencies in the presence of high market concentration is Federal Trade Commission v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001).

[11] *See, e.g.,* Smisek Apologizes For United's Technological, Operational Missteps, THEBEAT.TRAVEL, July 26, 2012, http://www.thebeat.travel/post/2012/07/26/Smisek-Apologizes-United-Missteps.aspx; Massive Integration Issues Continue to Affect United, PREMEIRTRAVELSERVICES.COM, April 13, 2012, http://premieretravelservices.blogspot.com/2012/04/massive-integration-issues-continue-to.html; Jim Glab, *United: Systems integration still causing some delays, problems*, EXECUTIVETRAVELMAGAZINE.COM, April 27, 2012, http://www.executivetravelmagazine.com/blogs/air-travel-news/2012/4/27/united-systems- integration-still-causing-somedelays-problems; United exec: Airline halfway through integration with Continental, BIZJOURNALS.COM, March 13, 2012, http://www.bizjournals.com/denver/news/2012/03/13/united-exec-airline-halfway-through.html; United Airlines Faces Delays After Systems Merger: IT difficulties cause kiosk malfunction, traveler setbacks, INVESTORPLACE.COM, March 5, 2012, http://www.investorplace.com/2012/03/united-airlines-faces-delays- after-systems-merger/; Linda Rosencrance, No Smooth Takeoff for US Airways IT Conversion: Integration of reservation systems with America West blamed for delays, COMPUTERWORLD.COM, April 2, 2007, http://www.computerworld.com/s/article/287874/No_Smooth_Takeoff_for_US_Airways_IT_Conversion; and Jad Mouawad, Delta-Northwest Merger's Long and Complex Path, NYTIMES.COM, May 18, 2011, http://www.nytimes.com/2011/05/19/business/19air.html?pagewanted=all.

[12] In 2008, when Congress held hearings about the then proposed Delta Air Lines – Northwest Airlines merger, Doug Steenland, CEO of Northwest, and Richard Anderson CEO of Delta, made all manner of projections and promises about how and when the merger would produce cost-reduction and revenue synergies, new efficiencies, better customer service and innovations while not abandoning routes, downsizing hub airports, withdrawing or degrading service to small and mid-size communities or

gouging consumers in monopoly markets. Indeed, Steenland went so fare as to argue that it would be virtually impossible to raise prices.

[13] U.S. Department of Justice, Department of Justice and Several States Will Sue to Stop United Airlines from Acquiring US Airways: Deal Would Result in Higher Air Fares for Businesses and Millions of Consumers, July 27, 2001, http://www.justice.gov/opa/pr/2001/July/361at.htm.

[14] GUIDELINES, *supra* note 7, at §11.

[15] GUIDELINES, *supra* note 7, at §12.

[16] We note that price transparency is also essential for antitrust enforcers to accurately evaluate the competitive effects of mergers and conduct-based issues. This ranges from defining relevant markets to determining a merger's effect on quality and choice.

[17] U.S. DOT Needs To Evaluate Airline Industry Consolidation: Is Proposed US Airways – American Airlines Merger Cause For Concern? BUSINESSTRAVELCOALITION.COM, April 22, 2012, *available at* http://businesstravelcoalition.com/press-room/2012/april-22---us-dot-needs-to.html.

[18] The same is true for concerns over extended tarmac delays.

[19] Hospital Corp. Of America v. FTC, 807 F.2d 1381, 1386 (7th Cir. 1986). See also FTC v. H.J. Heinz, 246 F.3d 708 (D.C. Cir. 2001)("Merger law 'rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above a competitive level.") (quoting FTC v. PPG Indus., 798 F.2d 1500, 1503 (D.C. Cir. 1986.)

[20] Binding Resolution 787 is appended to this testimony.

[21] *Flight Global*-Tony Tyler, IATA available (Feb. 2013) available http://www.flightglobal.com/interviews/tony-tyler/the-interview/

[22] See supra note 20

ATTACHMENTS

The Proposed Merger of US Airways and American Airlines: *The Rush to Closed Airline Systems*

August 8, 2012

Diana L. Moss and Kevin Mitchell[1]

Executive Summary

Should US Airways make a bid for American Airlines, currently in bankruptcy proceedings, the deal could present a conundrum for antitrust authorities. The transaction would create the largest domestic airline, reducing the number of legacy mega-carriers to three – Delta Air Lines (Delta), United Continental, and US Airways-American Airlines (US Airways-American). This consolidation would occur against an industry backdrop marked by a dwindling fringe of low-cost carriers (LCCs) and growing questions as to whether legacy look-alike Southwest Airlines-AirTran Airways (Southwest) exerts any significant competitive discipline in the industry. The merger could therefore hasten a troubling metamorphosis of the domestic airline industry from one in which hub airports were designed to accommodate multiple, competing airlines to a few large, closed systems that are virtually impermeable to competition and create a hostile environment in which LCCs and regional airlines have difficulty thriving and expanding.

This White Paper, produced jointly by the American Antitrust Institute (AAI) and Business Travel Coalition (BTC), asks: What competitive issues should be the focus of antitrust investigators in reviewing the proposed merger of US Airways and American? The paper takes the position that a U.S. Department of Justice (DOJ) investigation into the proposed merger of US Airways and American should be informed by mounting

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evidence on the effects of previous airline mergers, namely Delta-Northwest and United-Continental. The White Paper presents a brief analysis of these combinations and highlights a number of preliminary observations that deserve a more in-depth look. These range from the effects of previous mergers on creating costly post-merger integration problems, substantially reducing rivalry on important routes, producing above-average fare increases, and driving traffic to major hubs and away from smaller communities.

The White Paper continues on to evaluate key competitive issues raised by the proposed merger of US Airways and American that deserve some attention in an antitrust investigation. One is the expected outcome – similar to previous legacy mergers – that the proposed combination could eliminate competition on a number of important overlap routes, creating very high levels of concentration and potential harm to consumers. The risk that the proposed merger could adversely affect small communities through reduced levels of, or lower quality, air service is also worth a close look. Another observation is that the merger is unlikely to be one of complementary networks (as might be argued) and could instead create regional strongholds and solidify US Airways-American's control over key airports. Any arguments that the merger is necessary to create another "equal-size" competitor to the existing Big 3 systems are also not compelling. The analysis concludes by examining the potential effect of the merger on buyer market power and disclosure of information regarding ancillary service fees.

The joint AAI/BTC White Paper offers a number of concluding observations and recommendations. Among them is that our analysis of the US Airways-American merger – coupled with potential warning signs from previous legacy mergers – indicates that there may be enough smoke surrounding the proposed combination to indicate a potential fire. The merging parties therefore bear a heavy burden is demonstrating that their merger would not be harmful to competition and consumers.

I. Introduction

In the last several years, the U.S. airline industry has experienced both long-standing and novel challenges – fuel price volatility, limits to organic growth, pressures to expand globally, and slowing demand for air travel.[2] Both legacy airlines and LCCs have responded to these developments with bankruptcies, reorganizations, spin-offs, and new pricing strategies. Consolidation among airlines is perhaps the most commonly applied remedy for what persists in ailing the domestic airline industry. There have been six major mergers in recent years: US Airways and America West Airlines (2005), Delta Air Lines and Northwest Airlines (2008), Republic Airlines and Midwest Airlines (2009), Republic Airlines and Frontier Airlines (2009), and United Airlines and Continental Airlines (2010). In 2011, Southwest Airlines and AirTran Airways merged in the first major transaction involving LCCs. All six deals went through, unchallenged by federal antitrust authorities.

In April 2012, US Airways announced a move to take over American Airlines, currently in bankruptcy proceedings.[3] The merger would combine the fourth (American) and fifth (US Airways) largest airlines nationally, making US Airways-American the largest U.S. carrier with a combined share of over 20 percent, followed by Southwest with 18 percent, United Continental with 17 percent, and Delta with 16 percent.[4] The Big 4 would therefore control over 70 percent of the national market. The dwindling stock of LCCs after maverick AirTran was eliminated by Southwest consists of JetBlue, Frontier, and Spirit Airlines.[5] Not counting the merged Southwest, LCCs shares total less than 10 percent, with modest growth since 2007.[6]

A US Airways-American merger could present a conundrum for U.S. antitrust authorities. One challenge will be to fend off the argument that the merger cannot harm competition and consumers because American – currently in bankruptcy proceedings – would likely fail and exit the market anyway. Another is the claim that the merger is necessary because it would enable a newly merged American to compete with the two existing legacy behemoths, Delta and United Continental, that have been created from

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[2] See, e.g., Severin Borenstein, *Why U.S. Airlines Need to Adapt to a Slow-Growth Future*, BLOOMBERG.COM, June 3, 2012, http://www.bloomberg.com/news/2012-06-03/why-u-s-airlines-need-to-adapt-to-a-slow-growth-future.html.

[3] US Airways makes move to take over American, CBSNEWS.COM, April 20, 2012, http://www.cbsnews.com/8301-505144_162-57417634/us-airways-makes-move-to-take-over-american/.

[4] U.S. Department of Transportation, Bureau of Transportation Statistics, *Domestic Market Share: May 2011 – April 2012*, *available at* http://www.transtats.bts.gov/. Shares are measured by revenue passenger-miles.

[5] Sun Country, Virgin America, and Allegiant also provide some competitive discipline typical of LCCs.

[6] U.S. Department of Transportation, Bureau of Transportation Statistics, *Carrier Snapshots*, *available at* http://www.transtats.bts.gov/carriers.asp. Data from 2007 and 2012 (as of March 2012) for Frontier and JetBlue (data not reported for Spirit).

previous mergers, as well as the recent Southwest-AirTran combination. Yet another troubling question is whether the proposed merger could even be disallowed if all recent transactions were allowed to go through.

With the number of legacy carriers down to two, plus the legacy look-alike Southwest, the proposed merger would change the landscape of the airline industry in some expected and novel ways. For example, it is clear that – similar to previous mergers – some markets would be dominated by the merged carrier, while others would display the major features of an oligopoly, i.e., few, interdependent sellers. In concentrated oligopoly markets, small fringe competitors such as LCCs and regional carriers are less likely to effectively discipline the pricing of the resulting four powerful systems, *or* they may walk away from the opportunity to gain market share by going along with the higher prices that often accompany diminished competition.

Equally concerning is that the proposed merger could be the capstone event that transforms the industry into a fundamentally different one from what we have known. In the wake of antitrust and aviation policies that have encouraged the formation of fortress hubs, new entry at hub airports is now exceedingly difficult. And the entry that does occur is likely to provide weak, if not ineffective competition. Moreover, secondary airports in major metropolitan areas – heralded as providing competitive discipline for legacy-dominated hubs – do not exist in sufficient numbers to rescue all consumers adversely affected by previous mergers. More important, many secondary airports are themselves becoming dominated by the largest of the former LCCs, Southwest. The result has been the metamorphosis of an industry in which hubs were designed to be open access facilities at which multiple, competing airlines provided service, to only a few mammoth, closed systems that are virtually impermeable to competition and provide a hostile environment in which LCCs and regional airlines have difficulty thriving and expanding.

This White Paper, produced jointly by the AAI and BTC, frames the major competitive issues that should garner attention in an antitrust investigation of the proposed merger of US Airways and American. This analysis is based solely on publicly available information and is informed in part by analysis of previous mergers of legacy airlines, including Delta-Northwest and United-Continental. While we do not make a recommendation as to the legality of the proposed merger, we raise important questions that deserve investigation before a decision is made.

Section II of the White Paper proceeds to examine major features of airline mergers over the last decade. Section III analyzes pre- to post-merger effects of the Delta-Northwest and United-Continental mergers using data on fares and service levels on hub-to-hub routes. Section IV analyzes the proposed US Airways-American merger, including elimination of competition on overlap routes and pricing patterns, and suggests key issues for antitrust review. Section V concludes with observations and recommendations regarding the proposed merger and competition in the U.S. airline industry.

II. Major Themes from Recent Airline Mergers

Airline mergers in the last decade raise a number of recurrent themes and issues, ranging from the implications of acquisitions of bankrupt carriers, the perceived need to expand and reconfigure networks in order to compete globally, and efficiency justifications for consolidation. These factors, among others, are important to consider in an analysis of a US Airways-American merger.

A. Bankruptcy as "Business as Usual" or Imminent Failure of American?

Airline mergers are generally reviewed by the DOJ and the U.S. Department of Transportation (DOT). The DOJ has authority to block a merger even if it is approved by the DOT. The "failing firm" defense under the Department of Justice/Federal Trade Commission (FTC) HORIZONTAL MERGER GUIDELINES (GUIDELINES) provides a safe harbor if "...a merger [is] not likely to enhance market power if imminent failure...of one of the merging firms would cause the assets of that firm to exit the relevant market."[7] "Imminent" failure of a firm under the GUIDELINES is defined by specific criteria, including: the inability of a failing firm to meet its financial obligations in the near future or to reorganize successfully in Chapter 11, and a demonstration of good-faith efforts to garner offers that would keep the firm's assets in the market.[8]

Based on the GUIDELINES' criteria, it is clear that the failure of American is not imminent, even though American is in bankruptcy. Indeed, there are few examples of major U.S. airlines not emerging successfully from bankruptcy. For example, Trans World Airlines declared bankruptcy on three separate occasions over almost a decade.[9] The carrier's final bankruptcy filing in 2001 ended in a merger with American. Similarly, the bankruptcy of America West resulted in a merger with US Airways in 2005, a deal that went unchallenged by the DOJ.[10]

Other major carriers have declared and successfully emerged from bankruptcy on numerous occasions.[11] This lends some support to the notion that bankruptcy has become something of a "business as usual" condition unique to the highly cyclical airline industry whereby the firm remains a viable economic entity. What features of airlines make it more probable that they will emerge from bankruptcy? Among the factors that could

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[7] U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES (GUIDELINES), §11 (August 2010), *available* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

[8] *Id.*

[9] History of Airline Bankruptcies, FOXBUSINESS.COM, November 29, 2011, http://www.foxbusiness.com/travel/2011/11/29/history-us-airline-bankruptcies/.

[10] Keith L. Alexander, *US Airways To Merge, Move Base To Arizona*, WASHINGTONPOST.COM, May 20, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/05/19/AR2005051901972.html.

[11] Historically, some smaller carriers that have declared bankruptcy have not emerged successfully.

account for successful emergence are: valuable assets in aircraft, landing and takeoff slots, and highly specialized and experienced personnel. While this White Paper does not explore American's financial future, and assumes its eventual emergence from Chapter 11, it is nonetheless a key issue in evaluating the US Airways-American transaction.

Aside from the fundamental question of whether airlines are viable candidates for the failing firm defense in merger cases, there may be incentive issues that put antitrust law at odds with bankruptcy law. For example, the obligation to look for the *least* anticompetitive buyer under the failing firm defense conflicts rather diametrically with bankruptcy law, where the court's objective is to protect creditors. Indeed, in many bankruptcy situations, the most anticompetitive buyer is likely to be the high bidder with deep pockets and substantial market power, with the greatest potential for achieving monopoly rents through the exercise of such market power. This, combined with a foreshortened waiting period as compared with antitrust's premerger notification process, creates a forum-shopping incentive, such that some firms see bankruptcy as a means to accomplish an anticompetitive merger. It is interesting to note that recent reports indicate that US Airways wants to complete its acquisition before American exits bankruptcy, while American's CEO has strong personal financial incentives to bring his company out of bankruptcy as an independent firm.[12]

In light of the foregoing concerns, the failing firm defense for airline mergers should be viewed with some skepticism. It is important to note that the DOJ is not precluded from later challenging an anticompetitive acquisition that was approved by the bankruptcy court, although judicial efficiency would be enhanced if such a challenge could be made prior to the bankruptcy sale's completion. While a merger has been attacked in federal court outside of a simultaneous bankruptcy proceeding, we have not found an example of a bankruptcy sale later being challenged. This is not to suggest that bankruptcy courts do not recognize the potential antitrust consequences of a bid for assets or firms in bankruptcy, which seems to imply that they are aware that a sale can be unwound even after approval.[13] Consistent with this, the antitrust agencies seem to avoid appearing in bankruptcy court to contest a sale, preferring to preserve their opportunity to proceed outside of bankruptcy.[14] If DOJ decides to challenge the US Airways-American transaction, it can do so via the injunction route in federal court, notwithstanding American's bankruptcy proceeding.

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[12] Andrew Ross Sorkin, *American Airlines and US Airways Dance Around a Merger*, NYTIMES.COM, July 9, 2012, http://dealbook.nytimes.com/2012/07/09/american-and-us-airways-dance-around-a-merger/.

[13] *See, e.g.*, *In re* Financial News Network, Inc., 126 B.R. 152 (S.D.N.Y. 1991).

[14] Thus, in the Comdisco case, the bankruptcy court stayed the sale proceeding pending the resolution on the preliminary injunction motion in a concurrent district court challenge. *See In re* Comdisco Inc., (Bankr. D.D.C. 2001) (Sungard/Comdisco merger).

B. Too Big for Cost Savings?

Claimed efficiencies from airline mergers can be a powerful defense for an otherwise anticompetitive merger. After a six-month investigation into the Delta-Northwest transaction, for example, the DOJ concluded that the merger "is likely to produce substantial and credible efficiencies that will benefit U.S. consumers and is not likely to substantially lessen competition."[15] The agency counted as efficiencies those relating to cost savings in airport operations, information technology, supply chain economics, fleet optimization, and service improvements related to combining complementary networks.

Merger-related cost savings are a controversial subject. The economic literature has hosted an ongoing debate over issues relating to the tension between network size versus economies of scale and density, and efficiencies versus market power effects. This includes empirical economic work showing that efficiencies dwindle as networks increase in size and the effects of increased "hubbing" on congestion and costs.[16] As mergers become larger, the bar is raised on carriers to demonstrate to the DOJ that claimed efficiencies are substantial enough to overcome correspondingly large anticompetitive effects.[17]

An increasingly important factor in the efficiencies debate is post-merger integration. It is now clear that integration of major airlines presents major hurdles. Protracted and unwieldy system integration scenarios can impose costs on the merged company that are passed on to customers in the form of inconvenience, flight delays, and even litigation involving contested issues. For example, US Airways-America West, Delta-Northwest, and United-Continental all experienced system integration problems,[18] ranging from

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[15] U.S. Department of Justice, Statement of the Department of Justice's Antitrust Division on its Decision to Close its Investigation of the Merger of Delta Air Lines Inc. and Northwest Airlines Corporation, October 29, 2008, *available at* http://www.justice.gov/atr/public/press_releases/2008/238849.htm.

[16] *See, e.g.*, David Gillen, et al., *Airlines Cost Structure and Policy Implications*, 24 J. TRANSP. ECON. AND POL'Y 9 (1990); Michael Creel and Montserat Farell, *Economies of Scale in the US Airline Industry After Deregulation: a Fourier Series Approximation*, 37 TRANSP. RES. PART E 321, 332 (2001); W. M. Swan, *Airline Route Developments: A Review of History*, 8 J. AIR TRANSP. MGMT. 349 (2002). *See also* Subal C. Kumbhakar, *A Reexamination of Returns to Scale, Density and Technical Progress in U.S. Airlines*, 57 S. ECON. J. 428, 439 (1990) and Leonardo J. Basso and Sergio R. Jara-Diaz, *Distinguishing Multiproduct Economies of Scale from Economies of Density on a Fixed-Size Transport Network*, 6 NETWORK & SPATIAL ECON. 149 (2006). Regarding the balance of market power and efficiencies effects, *see e.g.*, E. Han Kim and Vijay Singal, *Mergers and Market Power: Evidence from the Airline Industry*, 83 AM. ECON. REV. 549 (1993).

[17] Perhaps the best example of the imperative for merging parties to show significant efficiencies in the presence of high market concentration is Federal Trade Commission v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001).

[18] *See, e.g.*, Smisek Apologizes For United's Technological, Operational Missteps, THEBEAT.TRAVEL, July 26, 2012, http://www.thebeat.travel/post/2012/07/26/Smisek-Apologizes-United-Missteps.aspx; Massive Integration Issues Continue to Affect United, PREMEIRTRAVELSERVICES.COM, April 13, 2012, http://premieretravelservices.blogspot.com/2012/04/massive-integration-issues-continue-to.html; Jim Glab, *United: Systems integration still causing some delays, problems*, EXECUTIVETRAVELMAGAZINE.COM, April

integrating computer systems, combining frequent flier programs, meshing work forces (particularly unionized employees), to problems with "cockpit standardization." Indeed, at the time of this writing, US Airways still has not produced a single pilot seniority list following its merger with America West in 2005.[19]

Based on accumulating evidence that post-merger integration problems are significant, there is a case to be made that future airline mergers could follow suit. Moreover, the costs associated with integration are probably underestimated when the merger is proposed and can skew an analysis of efficiencies benefits. One way to correct for this is for antitrust enforcers to discount the magnitude of claimed efficiencies at the time of merger review. This is an especially important consideration in light of the GUIDELINES inherent balancing of anticompetitive effects against claimed efficiencies.

Advocates of airline mergers will undoubtedly cite recent improved financial performance as evidence that mergers have proved up the cost savings. Before such claims are accepted, however, it is important to note that high profits may indicate any number of developments. One is that carriers have in fact realized claimed efficiencies. Alternatively, higher profits may be the result of higher fares achieved through the exercise of market power. A thorough post-mortem analysis of airline efficiencies that disaggregates these, and other potential merger-related reasons for higher post-merger profits, is badly needed. Such an analysis would also account for how successive airline mergers increase the probability that the merged carrier can externalize integration problems to captive customers without facing the threat of lost market share from defections to a dwindling number of rivals.

C. What Mergers are Unlikely to Raise Antitrust Enforcement Obstacles?

One of the few examples of a merger that failed to obtain antitrust clearance is United-US Airways (2000-2001). In that case, the DOJ's major concerns centered on loss of choice, potentially higher fares, and lower quality of service. The merger would have yielded a monopoly or duopoly on nonstop service on over 30 routes and "solidify[ied] control" by the merging airlines over major connecting hubs for east coast traffic.[20] The DOJ rejected

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27, 2012, http://www.executivetravelmagazine.com/blogs/air-travel-news/2012/4/27/united-systems-integration-still-causing-somedelays-problems; United exec: Airline halfway through integration with Continental, BIZJOURNALS.COM, March 13, 2012, http://www.bizjournals.com/denver/news/2012/03/13/united-exec-airline-halfway-through.html; United Airlines Faces Delays After Systems Merger: IT difficulties cause kiosk malfunction, traveler setbacks, INVESTORPLACE.COM, March 5, 2012, http://www.investorplace.com/2012/03/united-airlines-faces-delays-after-systems-merger/; Linda Rosencrance, *No Smooth Takeoff for US Airways IT Conversion: Integration of reservation systems with America West blamed for delays*, COMPUTERWORLD.COM, April 2, 2007, http://www.computerworld.com/s/article/287874/No_Smooth_Takeoff_for_US_Airways_IT_Conversion; and Jad Mouawad, *Delta-Northwest Merger's Long and Complex Path*, NYTIMES.COM, May 18, 2011, http://www.nytimes.com/2011/05/19/business/19air.html?pagewanted=all.

[19] Terry Maxon, *American Airlines-US Airways Merger: Questions and Answers*, DALLASNEWS.COM, April 20, 2012, http://aviationblog.dallasnews.com/2012/04/american-airlines-us-airways-m.html.

[20] U.S. Department of Justice, Department of Justice and Several States Will Sue to Stop United Airlines

a proposed remedy by the parties, including a divesture of assets at Washington D.C. Reagan National airport and a promise by American to fly five of the routes that would be adversely affected by the merger.

With few challenged airline mergers to evaluate, industry analysts and observers often opine on the legality of airline mergers based on fact patterns across mergers that antitrust enforcers *did not* attempt to block. For example, both Delta-Northwest and United-Continental involved multiple overlap routes, many of which involved 2-1 and 3-2 routes. Yet in contrast to United-US Airways, both deals went through, raising the question: How many overlap routes on which competition is substantially lessened should be enough to raise antitrust enforcement eyebrows? Given the fact pattern surrounding overlap routes in unchallenged mergers, one could deduce that the DOJ will look past problematic overlap routes if there is a modicum of rivalry from LCCs and legacies and the affected airports are not slot-constrained. As noted earlier, an efficiencies defense also appears to carry significant weight.

III. Lessons from the Delta-Northwest and United-Continental Mergers

There are a limited number of economic studies of airline mergers that examine post-merger price, output, and quality measures to determine if mergers are largely pro-competitive or anticompetitive. Increasingly, antitrust enforcement emphasizes the value of direct evidence of anticompetitive effects – including natural experiments and analysis of consummated mergers – in guiding future enforcement decision-making.[21] Both tools attempt to make the most use of actual, relevant events in evaluating prospective mergers, including evidence of adverse effects (e.g., post-merger price increases) and entry and exit, particularly in markets similar to those affected by a proposed transaction.

The proposed US Airways-American transaction presents a unique opportunity for the DOJ to analyze evidence on previous airline mergers. Indeed, it would be poor competition policy to undertake an antitrust analysis of the proposed merger without evaluating the effects of prior airline mergers. The analysis in this section frames the question of how consumers have likely fared after Delta-Northwest and United-Continental with a simple assessment of pre- to post-merger changes in fares and service measures on hub-to-hub routes.

The analysis performed here does not purport to determine what variables (including merger-related factors such as increased concentration) potentially explain pre- to post-merger changes in fares, service, or other variables. Moreover, there are data sources used in antitrust analysis of airline mergers other than the ones used here. Additional data and economic modeling and estimation is necessary for a comprehensive analysis of past mergers – a task that could be better conducted by the DOJ, with its access to proprietary

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from Acquiring US Airways: Deal Would Result in Higher Air Fares for Businesses and Millions of Consumers, July 27, 2001, http://www.justice.gov/opa/pr/2001/July/361at.htm.

[21] GUIDELINES, *supra* note 7, at §11.

information, including carriers' strategic planning documents.

A. Pre- to Post-Merger Changes in Fares and Service

The Delta-Northwest merger involves seven hubs – Atlanta (ATL), Cincinnati (CVG), Detroit (DTW), Minneapolis-St. Paul (MSP), Memphis (MEM), Salt Lake City (SLC), and New York John F. Kennedy (JFK). Ten routes involving these airports substantially eliminated one of the merging parties at the time the merger was proposed.[22] The United-Continental merger involves eight hubs: Cleveland (CLE), Denver (DEN), Newark (EWR), Dulles (IAD), Houston (IAH), Los Angeles (LAX), Chicago (ORD), and San Francisco (SFO). Eleven routes involving these airports substantially eliminated one of the merging parties at the time the merger was proposed.

The upper half of Table 1 shows percentage changes in real fares and increases/decreases in service for the 10 hub-to-hub routes affected by the Delta-Northwest merger over the time period bounded by one year prior to the merger (2007) and the most recent data available (2011).[23] The lower half of the table shows the same statistics for the 11 hub-to-hub routes over a time period bounded by one year prior to the United-Continental merger (2009) and the most recent data available (2011). Routes indicated by an asterisk are those for which fare increases are higher than the average for all flights at the origin airport. Delta-Northwest routes involving CVG as an origin or destination are not reported because post-merger cutbacks involving the airport are substantial.

[22] In a 2008 White Paper, the AAI examined concentration in airport-pair markets potentially most affected by the proposed Delta-Northwest merger, noting that changes in market concentration on many of those routes were significant and exceeded the GUIDELINES' thresholds. *See* American Antitrust Institute, *The Merger of Delta Airlines and Northwest Airlines: An Antitrust White Paper* (July 2008), *available at* http://www.antitrustinstitute.org/files/AAIWhite%20Paper_Delta_NW_071020081922.pdf.

[23] Service on hub-to-hub routes can be nonstop or connecting. Service changes are measured by both seat availability and flight frequency.

Table 1:
Pre- to Post-Merger Percent Changes in Fares and Directional Changes in Service on Delta-Northwest and United-Continental Hub-to-Hub Routes[24]

Percent Change in Fare	Decrease in Service	Increase in Service
Delta-Northwest (2007 – 2011)		
20 – 29		ATL-DTW* (4-2) DTW-ATL* (4-4)
10 – 19	DTW-JFK* (2-1)	MSP-ATL* (>4-2) ATL-MSP* (4-2)
0 – 9	-	SLC-DTW* (3-1) MEM-ATL (4-2) ATL-MEM* (4-2)
0 – (15)	-	SLC-MSP (3-2) MSP-SLC (3-2)
United-Continental (2009 – 2011)		
30 - 39	SFO-EWR* (4-1)	ORD-IAH* (4-2) IAH-ORD* (>4-3) EWR-SFO* (3-1)
20 - 29	DEN-EWR* (4-2) EWR-ORD*(3-2) EWR-DEN* (3-2)	DEN-IAH* (>4-2) IAH-DEN* (4-2)
10 - 19		IAH-SFO (2-1) SFO-IAH* (2-1)

*Indicates fare increases greater than the average for all flights at the origin airport. Average fare increases at the following Delta-Northwest hub airports between 2007 and 2011 are: ATL (-5%), DTW (14%), JFK (5%), MEM (12%), MSP (4%), and SLC (1%). Average fare increases at the following United-Continental airports between 2009 and 2011 are: CLE (20%), DEN (7%), EWR (16%), IAH (19%), ORD (10%), and SFO (14%). Negative fare changes are indicated in parentheses in the first column. The number of carriers on the route pre- and post-merger is indicated in parentheses next to each route.

B. Analysis

The analysis of pre- to post-merger fare and service changes on 21 total hub-to-hub routes involving the Delta-Northwest and United-Continental mergers reveals several important observations.

[24] Service measures are based on annual data from 2007 and 2011. *See* U.S. Department of Transportation, Bureau of Transportation Statistics, *T-100 Domestic Segment: U.S. Carriers*, *available at* http://www.transtats.bts.gov/DL_SelectFields.asp?Table_ID=259&DB_Short_Name=Air%20Carriers. Fare information for 2007, 2009, and 2011 obtained from U.S. Department of Transportation, Bureau of Transportation Statistics, *Origin and Destination Survey: DB1B Market*, *available at* http://www.transtats.bts.gov/DL_SelectFields.asp?Table_ID=247&DB_Short_Name=Origin%20and%20Destination%20Survey. Average fares at the origin airport for 2007, 2009, and 2011 obtained from U.S. Department of Transportation, Bureau of Transportation Statistics, *Average Domestic Airline Itinerary Fares By Origin City*, *available at* http://www.transtats.bts.gov/AverageFare/.

1. Reduction in Competition is Substantial

Both mergers substantially eliminated competition on hub-to-hub routes. The mergers together produced three monopoly routes and four duopoly routes – accounting collectively for over 30 percent of the total 21 routes – and more than doubling the number of routes on which there was limited competition (e.g., two or fewer carriers) before the merger.

Changes in market structure pre- to post-merger, however, are not limited to the direct elimination of a competitor. Several routes experienced the exit of non-merging rivals such as LCCs and regional airlines after the mergers. Some entry occurred (e.g., legacy and LCC) on a few routes, but it was on a very limited scale. Monopolies and duopolies resulting from post-merger shake-ups on the routes affected by Delta-Northwest and United-Continental therefore account for over 50 percent of total routes. This observation lends some support to the notion that mergers that enhance the carriers' dominance at a hub also dissuade incumbent carriers from remaining in the market. If this were true, then such routes would also be unlikely to attract entry.

2. Fare Increases are Above Average

A fare level analysis alone does not tell the entire story about post-merger prices. Ancillary fees (e.g., baggage, food, etc.) have exploded over the timeframe covered by our analysis of Delta-Northwest and United-Continental and fuel surcharges have been left in place even as oil prices have fallen. A more detailed, conclusive analysis therefore would require access to information on "all-in" fares. Nonetheless, a number of general observations are important. For example, based on our analysis, there appear to be a large number of substantial pre-to post-merger fare increases on the hub-to-hub overlap routes affected by the Delta-Northwest and United-Continental mergers. Fare increases are above average at the origin airport on 70 percent of routes affected by the Delta-Northwest merger.[25] The same is true of over 90 percent of routes affected by the United-Continental merger. Fare increases on United-Continental routes tend to be higher than on Delta-Northwest routes.

One half of the Delta-Northwest routes show fare increases exceeding 10 percent over the pre- to post-merger period, two of which exceed 20 percent. The other five routes show lower fare increases or fare decreases. All of the United-Continental flights show fare increases. Fare increases on nine of the 11 routes evaluated are above 20 percent, four of which exceed 30 percent. Many factors can potentially explain fare increases – inflationary pressure, rising input costs (e.g., labor and fuel), and higher demand for service on a particular route – all of which deserve further scrutiny. Such an analysis would need to consider that: (1) if fuel cost increases are responsible for higher fares over the periods examined, they would be likely to more uniformly affect all fares (and thus be reflected in average fares); and (2) if anything, demand for air travel has declined, not

[25] Note that average fares for routes at the origin airport are for general comparison purposes only.

increased, over the periods in question.[26]

Fare increases can also reflect the exercise of market power enhanced through the merger. For example, restricting seats and flight frequency could have the effect of raising fares. For flights for which demand is relatively inelastic (i.e., quantity demanded is relatively insensitive to price changes), however, a very small decrease in service may suffice to enable a fare increase. Higher fares may also reflect the fact that prior to the merger, the merging carriers were each other's largest rival. Under such circumstances, a price increase by one carrier could divert substantial sales to the merging partner, creating upward pricing pressure and increasing the probability of post-merger price increases.[27] Regardless of the underlying theory, observed fare increases could reveal the dominance of the merged carriers at hubs that serve as the origination or destination for routes and over which they can exercise market power.[28]

3. Merged Carriers Appear to Drive Traffic to Large Hubs

Over 75 percent of hub-to-hub routes affected by the Delta-Northwest and United-Continental mergers show service increases. The majority of these routes also display fare increases. There are nine Delta-Northwest routes and seven United-Continental routes in this category. The remaining roughly 25 percent of routes show service decreases, only one of which is a Delta-Northwest route, and all of which show fare increases. Overall, only 10 percent of the affected routes involved in the Delta-Northwest merger saw service decreases, as compared to over 35 percent in United-Continental.

There are a number of possible reasons behind service decreases. The first is that service cuts (in terms of both flights and seats) reflect output restrictions designed to hike fares.[29] A second scenario is that cuts in flight frequency – if accompanied by significant increases in load factor – may reflect efforts to eliminate excess capacity on pre-merger routes by better matching aircraft to routes. None of the routes with service decreases, however, exhibit changes in load factor from the pre-merger to post-merger period. Finally, service cuts may reflect efforts to trim service on less profitable routes and/or

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[26] Between 2007 and 2011, for example, total passengers emplaned at domestic airports decreased by almost 7 percent. *See* U.S. Department of Transportation, Bureau of Transportation Statistics, *T-100 Domestic Market: U.S. Carriers*, *available at* http://www.transtats.bts.gov/DL_SelectFields.asp?Table_ID=258&DB_Short_Name=Air%20Carriers.

[27] *See* GUIDELINES, *supra* note 7 at §6.1 and §6.3.

[28] The first scenario involves the classic "withholding" strategy in industries where firms are differentiated largely by capacity. "Upward pricing pressure" involves firms that sell differentiated products. Both are included here for illustrative purposes.

[29] The GUIDELINES emphasize both shorter-term output restrictions and longer-term capacity reductions as possible post-merger effects. The first type of quantity-related effect occurs in the near term, whereby the firm restricts output, as measured by flight frequency and available seats. The second type of capacity effect is longer-term, whereby firms reduce or slow additions (e.g., new airplane orders) to keep capacity tight and therefore prices high. *See* GUIDELINES, *supra* note 7, at §2.2.1.

shift traffic to better-situated hubs for domestic and international connections.[30]

Service increases may reflect an attempt by the merged carriers to drive traffic to major hubs to feed their international operations. Indeed, several of the 21 routes are among the largest city-pair markets in the U.S.[31] Not surprisingly, the airports most involved in service increases are fortress hubs such as Delta-Northwest's ATL and MSP, and United-Continental's IAH. An increasingly symbiotic relationship between domestic U.S. consolidation and global antitrust immunized alliances drives this effect. U.S. mega-carriers have now committed to the global alliance model as a proxy for cross-border mergers to more efficiently reach distant markets. Likewise, the financial success of the alliances is more and more dependent upon flowing high-yield passenger traffic through U.S. gateway airports.

4. The Mergers May Have Harmed Smaller Communities

Some airline mergers result in cutbacks in service at smaller hubs or focus cities. A major outcome of the Delta-Northwest merger was the elimination of Cincinnati as a Delta hub.[32] In the four years spanning 2007 to 2011, departures at Cincinnati declined, on average, by almost 40 percent.[33] Backlash to this well-publicized event, which became apparent not long after the merger was consummated, is best illustrated by the state of Ohio's efforts to prevent a similar outcome at Cleveland in the United-Continental merger.

There are numerous other examples of post-merger hub cutbacks. Between 2001 and 2009, American cut flights at TWA's former hub Lambert-St. Louis airport by 85 percent.[34] According to some sources, these cutbacks were accomplished by increasing the number of regional flights and shifting service to Chicago and Dallas. Similarly, between 2005 and 2009, the merged US Airways-America West reduced flights at Las Vegas by 50 percent.[35] Once enough data are available, it will be important to understand how Southwest is adjusting capacity after their 2011 merger.

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[30] The United-Continental hub most involved in service cuts is EWR.

[31] U.S. Department of Transportation, Office of Aviation Analysis, *Domestic Airline Fares Consumer Report*, Table 1, 4th Quarter 2011, *available at* http://ostpxweb.dot.gov/aviation/x-50%20Role_files/consumerairfarereport.htm.

[32] CVG is one of seven hubs at which both Delta and Northwest (at the time of the merger), offered limited (if any) hub-to-hub service.

[33] *T-100 Domestic Segment: U.S. Carriers, supra* note 24.

[34] American Antitrust Institute, *Competition at a Crossroads: The Proposed Merger of Southwest Airlines and Air Tran* 20 (December 2010), *available at* http://www.antitrustinstitute.org/~antitrust/sites/default/files/SouthwestAirTran%20White%20Paper.pdf.

[35] Bill McGee, *When Airlines Merge, Consumers Usually Loose*, USATODAY.COM, April 29, 2010, http://www.usatoday.com/travel/columnist/mcgee/2010-04-28-airline-mergers_N.htm.

It is worthwhile noting that while our analysis does not include smaller airports, a highly probable result of capacity adjustments at hubs is the degradation of service to smaller communities, which includes small and medium-size cities. Moreover, empirical work supports the notion that consolidation leads to consumer welfare losses involving small airports, with evidence from the Delta-Northwest merger.[36]

IV. Analysis of a US Airways-American Merger

We evaluated the proposed merger of US Airways and American with three types of analysis. The first is an airport-pair analysis of routes where both carriers offer service and the merger would eliminate a competitor. A second potentially useful analysis is how the carriers have historically tended to price relative to each other, and to other rivals. This analysis may provide some insight into the competitive dynamics in the markets that could be affected by the proposed merger. Finally, given our observations about previous mergers, it is important to consider potential efficiencies. Each of these issues is examined in the following sections, followed by a summary of major implications.

A. Airport-Pair Analysis of Market Concentration

The effect of the proposed merger on city-pair and/or airport-pair routes where American and US Airways overlap is likely to be the focus of an antitrust evaluation. There are 22 routes that appear potentially to be the most affected by the proposed merger, i.e., where the merger would eliminate one of the merging carriers and result in a substantial loss of competition. These routes involve US Airways and American hubs or focus city airports, including: Charlotte (CLT), Miami (MIA), Los Angles (LAX), Philadelphia (PHL), Phoenix (PHX), Dallas-Ft. Worth (DFW), Chicago O'Hare (ORD), and Washington Reagan National (DCA), and New York La Guardia (LGA).[37] Results of the analysis are shown in Table 2.

[36] *See, e.g.,* Volodymyr Bilotkach and Paulos Ashebir Lakew, *On Sources of Market Power in the Airline Industry: Panel Data Evidence from the US Airports* (February 2012), *available at* https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=IIOC2012&paper_id=205. The authors show welfare losses in over 30 small airports resulting from the Delta-Northwest merger.

[37] Service on hub-to-hub routes can be nonstop or connecting. JFK is an American hub but there are no apparent overlaps with US Airways on routes originating there.

Table 2:
Pre- to Post-Merger Changes in Market Concentration on Major Routes Resulting from the Proposed US Airways – American Merger[38]

Post-Merger HHI	Pre- to Post-Merger Change in HHI			
	500-1,999	2,000-2,999	3,000-3,999	4,000-4,999
3,000 - 3,999	PHX-LAX LAX-PHX			
4,000 - 4,999	DCA-ORF			
5,000 - 5,999				
6,000 - 6,999		PHX-ORD ORD-PHX PHL-ORD ORD-PHL		
7,000 -7,999				
8,000 - 8,999	LGA-CLT CLT-LGA	CLT-ORD ORD-CLT		
9,000 - 9,999		CLT-MIA	MIA-CLT	PHL-MIA MIA-PHL PHL-DFW DCA-BNA DFW-PHL
10,000				CLT-DFW PHX-DFW DFW-CLT DFW-PHX

Table 2 is best interpreted in several major sections. The lower half of the table shows 11 markets where the merger would essentially eliminate all competition. For example, in four markets involving hub-to-hub routes, the transaction would result in a monopoly. In seven additional airport-pair markets, post-merger concentration is in excess of 9,000 HHI, with large changes in HHI, many of which are higher than 4,000 points.

The middle of the table shows eight hub-to-hub markets where post-merger concentration is in the range of 6,000 to 8,999, with changes in the range of 500 to 2,999 HHI points. Finally, the upper portion of the table indicates shows three markets that would experience lower levels of merger-induced changes in concentration (500-1,999 HHI) and post-merger concentration (3,000-4,999 HHI). In all 22 cases, changes in market concentration and post-merger concentration exceed the thresholds specified in the GUIDELINES and would be presumed to lead to adverse competitive effects, including increases in fares, reduction in service, and loss of choice.[39]

[38] Service measures are based on data from 2012. *See* U.S. Department of Transportation, Bureau of Transportation Statistics, *T-100 Domestic Segment: U.S. Carriers, available at* http://www.transtats.bts.gov/DL_SelectFields.asp?Table_ID=259&DB_Short_Name=Air%20Carriers.

[39] The Guidelines state that markets for which post-merger concentration is less than 1,500 HHI are "unconcentrated" and mergers in such markets are unlikely to have adverse competitive effects. Markets for which post-merger concentration is between 1,500 and 2,500 HHI are "moderately concentrated" and mergers that induce changes in HHI greater than 100 points potentially raise significant competitive

B. Price Comparisons of High and Low Fares on Top Routes

In AAI's 2010 White Paper *Competition at a Crossroads: The Proposed Merger of Southwest Airlines and AirTran Airways*, pricing data provided valuable insight into how the two carriers competed, relative to one another, and other rivals in the market.[40] Price comparisons revealed that AirTran was an aggressive discounter relative to Southwest, lending support to the notion that the proposed merger would eliminate a "maverick" in the market. Given that American Airlines and US Airways are legacy carriers, we might expect price analysis to indicate a very different pattern. We looked at routes on which US Airways and American are the high fare and low fare carriers on top airport-pair routes.[41] It is important to note that the high/low fare data does not show the total number of rivals or their fares on top routes. Nonetheless, the data reveal potentially useful observations.

Of the total number of top routes reported, about 40 percent involve US Airways and American as high and/or low fare carriers. On 44 percent of routes involving the merging carriers, either American is *both* the high fare and low fare carrier or US Airways is *both* the high fare and low fare carrier. On these routes there is therefore no difference between the high and low fares.[42] The pricing data also indicate that the merging carriers are infrequently in situations where they aggressively undercut each other.[43] For example, American is high fare on only 2 percent of routes when US Airways is low fare and US Airways is high fare on 10 percent of routes when American is low fare.

These comparisons reinforce the obvious conclusion that American and US Airways are dominant players in the industry. But further observations are possible. For example, the fact that each carrier offers both the high and low fare on a sizable proportion of routes might reflect limited competition on those routes and thus the ability of each carrier to set prices. Given this pattern of high pricing, reinforced by evidence that the airlines rarely undercut each other, we could expect that on routes where the merging carriers *do* compete, they are more likely to be each other's biggest rivals, which is what we found in

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concerns. Markets for which post-merger concentration is greater than 2,500 HHI are "highly concentrated" and mergers that induce changes in HHI of 100 to 200 points potentially raise significant competitive concerns. Mergers that increase concentration by more than 200 HHI points in highly concentrated markets are presumed to be likely to enhance market power. *See* GUIDELINES, *supra* note 7, at §5.3.

[40] *Supra* note 34.

[41] U.S. Department of Transportation, Office of Aviation Analysis, *Domestic Airline Fares Consumer Report*, Table 1a, 4th quarter 2011, *available at* http://ostpxweb.dot.gov/aviation/X-50%20Role_files/consumerairfarereport.htm.

[42] American is both the high and low fare carrier on 21 percent of the routes and US Airways is both high fare and low fare on 23 percent of the routes.

[43] On average, U.S. Airway's low fare is a 13 percent discount off American's high fare but American's high fare is a 19 percent discount off U.S. Airway's high fare.

the overlap analysis in the previous section. This lends support to the possibility that a price increase by one carrier could divert substantial sales to the merging partner, creating upward pricing pressure and increasing the probability of post-merger price increases.[44]

C. Efficiencies

Many of the promised cost savings from airline mergers come from fleet optimization, such as right-sizing aircraft to routes to eliminate excess capacity, reduce costs, and increase efficiency; and service enhancements from merging complementary networks. While US Airways and American have not yet proposed how a merger would create benefits in both the short and long run, it is still worth noting several implications based on past mergers and the fact pattern surrounding the two legacy networks.

A combined US Airways-American fleet would consist of a variety of aircraft manufactured by Boeing, McDonnell Douglas, AirBus, and Embraer.[45] Almost 50 percent of the combined fleet would exhibit overlaps in the same types of Boeing aircraft.[46] Thus, while some post-merger adjustments in aircraft-to-route configurations might be possible, they may not be significant, unless US Airways and American plan on significant capacity retirements and bringing newer aircraft with different capacity profiles into service in the near future. Moreover, if the merging carriers are not currently individually optimizing their fleets, the burden should be on them – if the carriers plan to introduce this aspect of an efficiency defense – to show why they could not optimize their fleets without the merger.

Another key issue potentially raised by an efficiencies defense is distinguishing capacity adjustments that present opportunities to actually reduce costs from those that simply increase prices or harm some classes of consumers (e.g., smaller communities). On routes where there are load factor differences between US Airways and American flights, the merged carrier might implement cost-reducing adjustments involving aircraft and service frequency. However, as the analysis of Delta-Northwest and United-Continental makes clear, post-merger capacity adjustments can have a range of positive and negative effects that may be extraordinarily difficult to disaggregate and categorize as costs or benefits at the time a merger is reviewed. Even if efficiency-enhancing capacity reductions are possible to identify and isolate, it remains the burden of the merging parties to show how their merger is necessary to achieve such capacity reductions, as opposed to each carrier accomplishing such adjustments individually.

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[44] The average discount off American high fares is 19 percent, 27 percent for LCCs, and only 12 percent for Southwest. The average discount off US Airways fares is 17 percent, 22 percent for LCCs, and only 15 percent for Southwest.

[45] Our Aircraft, AA.COM, http://www.aa.com/i18n/aboutUs/ourPlanes/ourPlanes.jsp. US Airways *Fleet*, usairways.com, http://www.usairways.com/en-US/aboutus/pressroom/fleet.html.

[46] American Airlines Fleet Details and History and US Airways Fleet Details and History, PLANESPOTTERS.NET, http://www.planespotters.net/Airline/American-Airlines and http://www.planespotters.net/Airline/US-Airways.

D. Major Issues Raised by the Proposed Merger

The brief foregoing analysis of overlap routes, pricing, and capacity has a number of implications that should be considered by antitrust enforcers in their investigation of the proposed US Airways-American merger.

1. The Merged Network Potentially Increases Control Over Connecting and Intra-Regional Service in the U.S.

The network configuration of a merged US Airways-American has important implications for control over both connecting service and intra-regional service in the U.S. The networks of US Airways and American do not appear to be particularly complementary. There is relatively little "white space" in each network footprint that could be filled by the other carrier. Instead, combining the two networks could create regional and functional strongholds throughout the U.S. For example, the merged carrier would have a strong presence at six major airports on the eastern seaboard – JFK, LGA, PHL, DCA, CLT, and MIA.[47]

US Airways-American would also have a presence at two key western airports – LAX and PHX. These airports are integral to providing connecting service to other western destinations. Finally, the carrier would have significant market share at two key midwestern airports, DFW and ORD, that are critical for providing connecting service to eastern destinations. Indeed, there is a resemblance to the United-US Airways merger of 2001, which was challenged by the DOJ on the basis of "solidifying control" over hubs.

2. A Substantial Percentage of Overlap Markets Would be Monopolized or Near-Monopolized by the Merged Carrier

Over 50 percent of the overlap routes potentially affected by the proposed merger of US Airways and American would be monopolized or nearly monopolized. In light of our earlier observations regarding fares and service in the aftermath of the Delta-Northwest and United-Continental mergers, the effect of the US Airways-American merger on overlap routes should garner some attention.

Airport-pairs reflect the narrowest relevant market definition in an airline merger. For example, a small but significant price increase on a route from CLT to DFW could be profitable because a substantial group of consumers would *not* substitute Dallas Love Field (DAL) for DFW. The reasons why consumers choose not to use alternative airports are relatively straightforward. Traveling to more remote airports may be more inconvenient and costly, some routes may involve the inconvenience of one or two stops,

[47] The combined shares based on passenger-miles at various hubs are: JFK (25 percent), LGA (30 percent), PHL (almost 60 percent), DCA (over 40 percent), CLT (over 90 percent), MIA (almost 85 percent), LAX (about 30 percent), PHX (about 50 percent), DFW (almost 90 percent), and ORD (about 45 percent). *See* U.S. Department of Transportation, Bureau of Transportation Statistics, *Air Carriers: T-100 Domestic Market (U.S. Carriers)*, *available at* http://www.transtats.bts.gov/DL_SelectFields.asp?Table_ID=259&DB_Short_Name=Air%20Carriers.

and the timing of flights may be less frequent.

However, the DOJ typically considers the feasibility of consumer switching in cities with multiple airports. If switching is more likely, then markets might be defined more broadly as city-pairs, potentially containing more suppliers, and exhibiting lower concentration. Several hub airports that could be affected by the proposed merger (DFW, DCA, ORD, MIA, and LGA) are located in cities where there are alternative airports.[48] A brief review of these alternative airports indicates somewhat limited substitution options for travellers.

For example, travellers going to or from the New York City area might use JFK or EWR. JetBlue offers service from JFK that might provide some relief from potential post-merger fare increases. On routes originating or terminating in Chicago, Washington D.C., Dallas, or Miami areas, travellers could avail themselves of service that Southwest or LCCs offer at secondary airports Midway (MDW), Baltimore-Washington (BWI), Fort Lauderdale (FLL), and DAL.

Any claim that service offered by rivals at alternative airports can effectively discipline adverse post-merger effects on routes involving US Airways and American hubs, however, should be tempered by a number of important considerations. First, not all routes that could be affected by the US Airways-American merger are well-replicated by other carriers at alternative airports in terms of flight frequency and other important features.[49] Second, legacy competition cannot be relied upon to discipline post-merger increases on affected routes. Empirical work, for example, shows that the estimated effects of legacy competition are weak.[50] Indeed, much of the competition on the airport-pairs potentially affected by the proposed US Airways-American combination comes from legacy rivals. Third, as consolidation has significantly narrowed the field of competitors on airport-pair and city-pair routes, the probability of tacit coordination between remaining carriers (even on city-pairs), increases.

Fourth, JetBlue has continued to focus on the leisure market in Florida and the Caribbean and may not provide a particularly good substitute for business travelers who could be adversely affected by a merger of US Airways and American. Fifth, Southwest has a substantial presence at secondary airports such as MDW, BWI, and DAL where it could potentially wield significant market power. Indeed, there is evidence that fare discipline

[48] Depending on timing and the scale of entry, it is also possible that potential entry by carriers could change the competitive landscape in airport-pair and city-pair markets.

[49] Some routes originating or terminating at DFW cannot be replicated using DAL.

[50] Jan K. Brueckner, Darin Lee, and Ethan Singer, *Airline Competition and Domestic U.S. Airfares A Comprehensive Reappraisal* 48 (June 2010, revised May 2012), *available at* http://www.socsci.uci.edu/~jkbrueck/price%20effects.pdf. Brueckner, at al note (at 29) that "... our results imply that mergers between legacy carriers that reduce such competition may tend to generate small potential aggregate fare impacts as long as the overlap between the networks of the two carriers is limited." Presumably, if overlaps are not limited (as is likely the case in US Airways-American) then this conclusion should be tempered accordingly.

wanes as LCCs (e.g., Southwest) gain market share at key secondary airports.[51] Trading one monopoly route that might be adversely affected by a US Airways-American merger for another that uses an alternative airport dominated by Southwest is unlikely to produce fare decreases in the wake of the merger.

In sum, while there are a number of alternative airports in cities with US Airways and American hubs that might be affected by the proposed merger, it is clear that they do not all provide good substitutes or justify defining markets around city pairs, as opposed to airport-pairs. When consumers have limited choices in airports (even within the same city), markets are typically smaller and more concentrated and the remaining carriers in the market can exert more control over fares.

3. The Merger Increases the Probability of Adverse Unilateral or Coordinated Effects

Fare increases following the Delta-Northwest and United-Continental mergers have important implications for another legacy merger. Indeed, the fact pattern for a US Airways-American merger is similar. Substantial competition would be eliminated on important routes; there appear to be limited options facing consumers seeking to avoid post-merger price increases in cities with multiple airports; and both US Airways and American tend to be high-priced rivals. The merger would create a dominant firm with a substantial presence on a significant proportion of important airport-pair routes.

One competitive concern is how the firm, acting unilaterally (alone) post-merger, might be able to exercise market power, with adverse effects on fares, service, convenience, and consumer choice. As noted earlier, if consumers view the two carriers as close enough substitutes such that sales from one of the merging parties would be diverted to the merger partner enough to make a price increase profitable, the merger could result in upward pricing pressure. On overlap routes where US Airways and American are the dominant carriers – as is the case on a number of routes potentially affected by the merger – diversion of sales from US Airways to American (or vice-versa) is more likely.

The merger could also increase the risk of anticompetitive coordination. There are relatively few competitors on top routes. A number of factors could facilitate explicit or tacit collusion, including high levels of price transparency, relatively homogeneous products within fare classes, and visible cost structures. It is therefore possible that the proposed merger could facilitate anticompetitive coordination on fares, ancillary fees, or capacity among the few carriers on routes affected by the merger.[52]

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[51] *See e.g.*, John Kwoka, Kevin Hearle, and Phillippe Alepin, *Segmented Competition in Airlines: The Changing Roles of Low-Cost and Legacy Carriers in Fare Determination*, working paper, presented at 10th Annual IIOC, Washington, DC (May 2012).

[52] For more on anticompetitive coordination involving airlines, *See, e.g.*, Several Borenstein, *Rapid Price Communication and Coordination: The Airline Publishing Case* (1994), in THE ANTIRUST REVOLUTION 233 (John E. Kwoka Jr. and Lawrence J. White, eds., 2004).

It is not obvious that LCCs would assuage concerns over adverse effects that could result from a US Airways-American merger. Based on our analysis of routes affected by the Delta-Northwest and United-Continental mergers, LCCs may have a limited ability to induce price discipline among the legacy carriers that serve hub-to-hub routes. We note that LCCs do not factor prominently on routes that could be adversely affected by US Airways-American and that the most important LCC (Southwest) has itself merged and behaves more like a legacy carrier. Shares on US Airways-American overlap routes are concentrated largely among legacy carriers, lending some support to the possibility that potential fare increases could be significant.

4. The Merger Could Harm Smaller Communities

As a consequence of U.S. policies that have supported increased U.S. airline industry consolidation, many mid-size communities have seen flight frequencies reduced, equipment downgraded or service lost altogether. Scores of airports are expected to lose scheduled service in the immediate years ahead as well as attendant local and regional economic benefits that flow from connectivity to the world's important business centers.[53] This development, playing out in real time, is tied to U.S. public policy that encourages domestic consolidation and fortress-like hub airports.

Evidence from the Delta-Northwest and United-Continental mergers indicates that merged carriers have adjusted capacities on overlap routes where they are dominant in a variety of ways. One is to drive more traffic to large hubs, with the possible side effect of starving routes involving smaller cities. Similar fact patterns across these mergers and US Airways-American raises the possibility that smaller communities could be harmed by the proposed merger. Loss of consumer choice that forces consumers to use less convenient connecting service or travel longer distances to other airports represent legally cognizable adverse effects of a merger.[54]

The practical implication of the foregoing is that antitrust enforcers should regard with skepticism any denials by the merging parties of future negative effects on many of the markets served before the merger. Moreover, in light of the potential harm to smaller communities, airline mergers should not be given a "pass" on the basis of countervailing "out-of-market" benefits. In other words, any probable harm to smaller communities resulting from the US Airways-American merger he must be directly addressed.

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[53] *See, e.g.*, Boyd Group International, *Air Service Challenges & Opportunities For US Airports* (2012), *available at* http://www.aviationplanning.com/Images/AirServiceRealitiesFromBoydGroupInternational.pdf. *See also* Will Phase-Out of RJs Doom Small Airports? 81 AIRPORT POLICY NEWS (July/August 2012), *available at* http://reason.org/news/show/airport-policy-and-security-news-81.

[54] For further discussion, *see, e.g.*, Robert H. Lande and Neil W. Averitt, *Using the 'Consumer Choice' Approach to Antitrust Law*, 74 ANTITRUST L. J. 175 (2007).

5. The Systems Competition Argument is Complex and Requires Careful Scrutiny

One rationale for merger is to grow larger to match rivals' size in the domestic and international spheres. This rationale is part of the "systems" argument for consolidation, the kernel of which is that carriers that are national in scope should be about equal in size in order to compete effectively. If a systems argument based solely on the need to have equal size competitors were to hold sway, then successive mergers would lead to the Big 3, then the Big 2 carriers, while dimming the prospects for a continued LCC presence in the industry. For the systems argument to be compelling, a more robust rationale is therefore necessary to convince antitrust enforcers not to challenge an airline merger.

For example, for systems competition to be effective, carriers must be able to quickly enter routes that provide comparable alternatives to the service provided within the networks of rival hub-and-spoke and point-to-point or hybrid systems. This is unlikely to be the case. Legacy hub-and-spoke systems feature carriers that dominate certain hubs, making entry by rivals difficult, particularly in cities or regions without alternative airports. Moreover, entry into markets where either the origin or destination is *not* a hub or a hub-equivalent (e.g., a secondary airport that provides a comparable alternative to a hub) is less likely to enhance systems-based competition.

Finally, it is clear that consumers cannot easily switch between different airline systems. A number of factors have the effect of locking consumers into one carrier, including: frequent flyer programs, brand loyalty, participation in code-sharing and international alliances, and location relative to airlines hubs. Consolidation has arguably exacerbated this consumer lock-in effect over time. The equal-size competitor argument as a justification for merger should therefore account for the fact that constraints on the consumer side limit rivalry between systems.

6. The Proposed Merger Could Enhance Monopsony Power

Consolidation in the domestic industry has produced three large airline systems from six airlines in four years' time (Delta, United Continental, and Southwest). The proposed merger of US Airways and American would eliminate yet another airline to produce four mega-carrier systems. Another merger of major carriers should begin to raise questions, as described in the GUIDELINES, about the effect of the transaction on the carriers' buying market power. The proposed US Airways-American merger raises two potential sources of concern.

One monopsony issue is that a merged US Airways-American, as the largest carrier in the U.S., could wield significantly more buyer power than each carrier does independently. As a result, the merger could – as the GUIDELINES describe – reduce the number of "attractive outlets for their [suppliers'] goods or services."[55] Airlines are significant purchasers of goods and services from sellers in complementary markets. These suppliers

[55] GUIDELINES, *supra* note 7, at §12.

include: travel agencies, travel management companies, airports, distribution systems, parts suppliers, and caterers. Such suppliers are far less powerful and dispersed relative to the airline buyers with which they do business. As a result, they lack the bargaining power necessary to balance the buyer power potentially exercised by the merged carrier. The merger could therefore result in suppliers being squeezed by below-competitive prices paid for their goods and services.

A second source of concern surrounding monopsony power relates to the role of US Airways and American in global airline alliances. Because US Airways and American are currently in different global alliances, and one carrier would switch alliance membership, an important by-product of the merger would be a reconfiguration of the international alliances landscape. Given American's protracted and controversial efforts to obtain antitrust immunity for its participation in the oneworld alliance, it is more probable that US Airways would defect from the Star alliance to join oneworld.

Global antitrust immunized airline alliances are already powerful buying groups that exert market power over various suppliers. The merger of US Airways and American (conformed within one alliance) could produce a larger oneworld alliance vis-à-vis a more disparate set of suppliers. Similar to the argument regarding the merging carriers themselves, the monopsony concern in the global alliance context arises because the merged carrier could create a more powerful oneworld alliance group buyer. An antitrust investigation into the proposed merger of US Airways and American should frame the question of how the proposed merger could affect the incentive and ability of the larger oneworld alliance to adversely affect prices paid to the various alliance suppliers by driving them below competitive levels.

The likelihood of monopsony effects that might result from the proposed merger is difficult to predict without information from the suppliers who themselves do business with the airlines and with global airline alliances. Specifically, it will be important for the DOJ to understand how suppliers' bargaining power could be affected by a combined US Airways-American and a larger and potentially more powerful oneworld alliance.

7. The Proposed Merger Could Exacerbate an Existing Lack of Ancillary Service Fee Transparency

Price transparency is vitally important for the competitive process to function properly.[56] However, the latest round of airline industry consolidation has been accompanied by carriers aggressively unbundling their products (e.g., checked baggage, advance boarding, preferred seating, etc.) and charging fees for services previously included and paid for by consumers in the price of their tickets. While unbundling is generally pro-competitive, it is unlikely to be beneficial without transparency in prices that is typically intended to accompany it. Indeed, airlines have been increasingly able – without

[56] We note that price transparency is also essential for antitrust enforcers to accurately evaluate the competitive effects of mergers and conduct-based issues. This ranges from defining relevant markets to determining a merger's effect on quality and choice.

competitive repercussions – to ignore the demand for ancillary fee data even from their largest, most sophisticated customers.[57] Moreover, airlines have inadequately responded to the concerns of Congress and the DOT over lack of transparency and purchasability of ancillary fees.[58]

The obvious struggle within the domestic airline industry over unbundling and price transparency is a conflict that presents an important "cross-over" issue between consumer protection and antitrust. For example, in eschewing true price transparency, airlines increasingly mask the all-in price of air travel, with two major adverse effects. First, lack of price transparency prevents consumers from efficient comparison-shopping of air travel offerings across multiple airlines – a hallmark of U.S. airline industry deregulation. A second consequence of the deterioration in price disclosure is that ancillary fees go largely undisciplined by market forces. Likewise, base fares are today not exposed to the full discipline of the marketplace and represent unreliable comparative benchmarks for consumers and regulators alike because some fares contain specific services that others do not. Arguably, to the extent that airlines are in a commodity business, it is to their advantage to attempt to differentiate themselves by making meaningful price comparisons difficult.

The question for an antitrust investigation of a proposed merger of US Airways and American is whether the combination could dampen the merged carriers' incentive to disclose ancillary fee information to consumers. If so, such an adverse outcome could represent a cognizable adverse effect of the merger. Arguably, as airlines have grown larger and more powerful relative to consumers through consolidation, carriers have increasingly been able to refuse to provide consumers with so-called ancillary services and associated fees information. This supports the notion that rivalry creates incentives for sellers to fully inform consumers about the pricing, quality, and availability of their products. A loss of competition through merger therefore diminishes those incentives, particularly in cases such as US Airways-American where the combination results in extremely high levels of concentration.

It will be important for the DOJ to determine if and how a merger of US Airways and American – a transaction that would create the largest airline in the U.S. – could alter the ability and incentive for the merged carrier to disclose ancillary fee information differently than before the merger. The mechanism for this may be that with fewer players in the market, the need for sellers to reach agreement on matters such as how to deal with baggage fees is minimized because it can be handled by the airlines "tacitly." Curbing or preventing such behavior is one of the major purposes of the antitrust laws, particularly merger control.

In light of the fact that the industry has long-opposed efforts to require fuller disclosure,

[57] U.S. DOT Needs To Evaluate Airline Industry Consolidation: Is Proposed US Airways – American Airlines Merger Cause For Concern? BUSINESSTRAVELCOALITION.COM, April 22, 2012, *available at* http://businesstravelcoalition.com/press-room/2012/april-22---us-dot-needs-to.html.

[58] The same is true for concerns over extended tarmac delays.

the benchmark for a forward-looking analysis of how a US Airways-American combination affects information disclosure should be the DOT's statutory authority to remedy unfair and deceptive practices in air transport.[59] For example, the merger may increase the leverage the airline might have over the DOT or expose weaknesses in policing and enforcing conduct regarding fee information disclosure under the regulatory statute. If so, then there may well be a role for antitrust to play in remedying adverse effects relating to ancillary fee disclosure in the merger proceeding.

V. Conclusions

The proposed merger of US Airways and American ideally presents the opportunity for antitrust enforcers to consider the implications of similar fact patterns and parallels with previous legacy combinations. Moreover, the proposed transaction should be viewed with an eye to the critical transformation such a transaction could impose on the domestic airline industry and its consumers. Four large airline systems and a small and dwindling fringe of LCCs and regional airlines would populate the industry. While the analysis discussed in this White Paper is by no means conclusive of the likely effects of the proposed transaction, it may serve to frame several key issues that deserve attention in an antitrust investigation and more broadly by aviation policymakers.

- ***In light of the potential for adverse affects indicated by our brief analysis of the proposed merger, the burden remains with the merging parties to show that their transaction would not substantially lessen competition and harm consumers.*** Based on an analysis of overlap routes that demonstrate high levels of merger-induced and post-merger concentration, the proposed merger of US Airways and American could potentially substantially lessen competition. Coupled with clear warning signs from previous legacy mergers regarding post-merger fares and service to smaller communities, there appears to be enough smoke surrounding the proposed merger to indicate a potential fire. The merging parties therefore bear a heavy burden in demonstrating that their merger would not be harmful to competition and consumers.

- ***Efficiencies claims should be viewed skeptically by antitrust enforcement.*** Three major factors should give the DOJ significant pause in relying on any efficiency claims for approving the proposed merger of US Airways and American. One is the diminishing likelihood of realizing typical efficiencies as networks become larger. Another is a growing body of evidence surrounding costly and unexpected integration problems in past mergers. Finally, as the analysis of Delta-Northwest and United-Continental makes clear, post-merger capacity adjustments can have a range of positive and negative effects that may be extraordinarily difficult to disaggregate and categorize as costs or benefits at the time a merger is reviewed. Collectively, these factors highlight the need to treat efficiency claims with skepticism, particularly in large mergers.

- ***LCCs cannot be relied upon to save the day for legacy mergers that present sizable***

[59] Federal preemption strips airline industry consumers of FTC protections as well as virtually all state remedies under consumer protection laws.

competitive issues. The dwindling stock of LCCs and their exposure as potential takeover targets – particularly in light of the Southwest-AirTran merger – makes them increasingly unreliable as a source of competitive discipline in the industry. Pre- to post-merger fare increases on Delta-Northwest and United-Continental routes highlight the challenges that smaller, lower-cost rivals face on hub-to-hub routes dominated by legacy carriers. Increasingly concentrated hubs resulting from previous legacy mergers raise further barriers to LCC entry that could potentially discipline adverse effects.

- ***Airline merger review should consider the adverse effects of merger-related service cutbacks to smaller communities.*** Choice and availability are important variables in the antitrust analysis of transportation networks, since consumers have limited flexibility over the points at which they enter (and exit) the network. The sacrifice of service to smaller domestic communities in the name of driving traffic to larger hubs that serves to improve the global competitiveness of domestic airlines is a lose-lose situation for many American consumers.

- ***Any argument that the proposed merger is necessary to create a larger system to effectively compete with the existing three systems is fundamentally flawed.*** For a systems arguments to be persuasive enough to justify antitrust approval, far more than the "equal size competitor" rationale would be necessary. Proponents of this rationale ideally need to demonstrate to antitrust enforcers how roughly equal size systems provide effective competition in the face of network differences, entry barriers, and consumer switching constraints.

- ***Competitive issues related to slot transfers at New York La Guardia airport and Washington D.C. Reagan National airport should be resolved in this proceeding.*** The recent swapping of slots between US Airways and Delta at LGA and DCA would enhance US Airways' market share at DCA, a slot-controlled airport that would be affected by the proposed US Airways-American merger. Should the DOJ seek to negotiate a settlement with the merging parties, divestitures or other remedies involving the slot transfers – which materially affect the competitive landscape at DCA – might be sought as part of the merger transaction.

- ***The proposed merger raises competition issues that may require remedies that are broader than divestitures or carve-outs.*** Evidence from previous large mergers emphasizes that smaller communities, including small and mid-size cities, may have been harmed by post-merger capacity adjustments. Such communities should therefore be protected from the anticipated loss of hub services and degradation of service from a US Airways-American merger. One approach, for example, could be a multi-year moratorium on reductions in the number of seats and flights on routes involving major hub airports.

- ***Policies to promote LCCs and to ease participation by foreign airlines in domestic air travel are needed.*** As consolidation places more pressure on the dwindling stock of LCCs to discipline merger-related fare increases, it is clear that some policy is

needed to promote the role of LCCs in providing options to consumers for bypassing large legacy networks and putting some potential limits on their dominance.[60] Likewise, policies to ease participation by foreign airlines in domestic markets could increase competition.

- ***Short of moving to block the merger, the traditional remedies available to antitrust enforcers to fix a problematic airline merger may be inadequate in light of certain competitive problems raised by US Airways-American.*** In the event that the DOJ does have concerns over monopsony and ancillary fee disclosure issues in the context of the proposed merger, fixing them may test the effectiveness of traditional structural and behavioral antitrust remedies. Policymakers may therefore want to consider additional fixes – including legislative and regulatory approaches. For example, addressing the imbalance in market power between the increasingly powerful global alliances and more atomistic collection of service providers may be better addressed through amendments to the National Labor Relations Act to expressly permit travel agents to engage in collective bargaining with airlines. In order to address price transparency problems resulting from an imbalance in market power between the airlines and consumers, policymakers might consider the efficacy of a minimum set of national consumer protections, enforceable at the state level, to protect consumers while avoiding burdening airlines with a patchwork of consumer laws. The DOT might consider promulgating a new rule that would require airlines to provide ancillary fee data in a transparent and salable format in any channel they choose to sell their base fares such that consumers may efficiently compare full-price offerings from multiple airlines on an apples-to-apples basis.

[60] Empirical economic analysis indicates that historically, LCCs have exercised significant competitive discipline – a role that presumably is worthwhile preserving for the benefit of competition and consumers. See, e.g., Brueckner, et al, *supra* note 50 and Kwoka, et al, *supra* note 51.

RESOLUTION 787

ENHANCED AIRLINE DISTRIBUTION
(new)

PSC(34)787

Expiry: Indefinite
Type: B

RESOLVED that,

Members and/or systems providers may, for online or interline carriage, provide capability to offer a wide selection of their products and services to their customers through a wide variety of distribution channels. Members and/or systems providers shall apply the following procedures when distributing enhanced content through multiple channels of distribution with their many partners.

OBJECTIVES

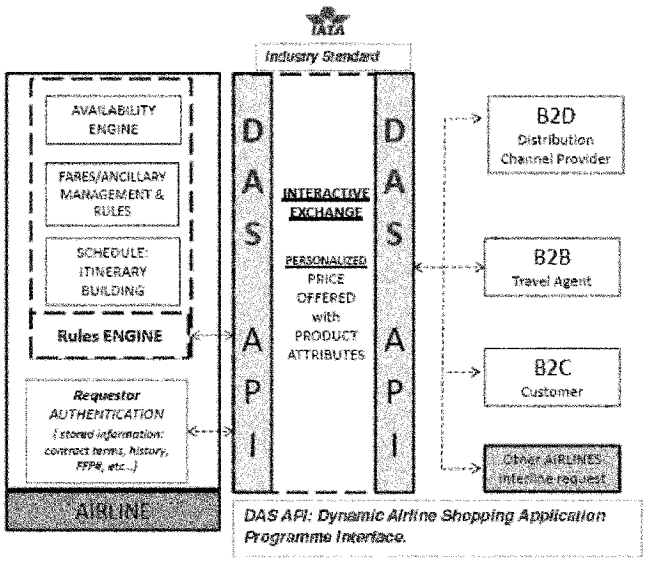
1. General

IATA standards and procedures allow airlines to better manage the distribution of their range of products and services that they wish to provide in an effective way, irrespective of the distribution channel. Enhanced standards are necessary to enable airlines to move to a dynamic content distribution model. This model recognizes that airlines and their customers need more real time dynamic interaction between all parties: airlines, distributors and travel agents so they can offer an intelligent response for all products based on who is asking. Acknowledging that a management group is required to oversee the development of new passenger distribution processes and standards, a Passenger Distribution Management Group is established in accordance with the provisions as published in Attachment "A".

1.1 Scope

This resolution recognizes that a standard process is required for airlines to create their own product offer within their own systems (i.e. assemble fares, schedules and availability - all in one transaction) which will be provided directly by and owned by the airline. This will enable more agile pricing and more personalized offerings. In this way, all product offers (including ancillaries) will be available for distribution through all channels that an airline wishes to sell them through. In this regard, this IATA standard will enable the creation of a Dynamic Airline Shopping engine Application Programme Interface (DAS API) based on IATA XML messages. The focus of this resolution will describe the main business processes that are required to support it.

Distribution Capability Landscape



The diagram above represents the Distribution Capability landscape that will provide an interactive exchange based on knowing who is making the request irrespective of the distribution channel being used. This may involve, but not be limited to requests from passengers, agents, interline partners, and other distribution channel providers who may provide solutions to their own subscribers. Requests shall be sent using industry standard messages from the distribution channel provider to the airline's dynamic shopping engine. Airlines will determine what product offer to return in the response based on attributes that have been sent in the request. Solution providers shall be capable of providing interactive messaging to an airline's DAS API in accordance with industry standard messaging.

1.2 Key Principles

1.2.1 Business and technical standards shall enable airlines to distribute products across all channels and allow airlines to independently offer dynamic shopping/pricing through any channel.

1.2.2 Underlying messaging standards will use modern messaging technology (e.g. XML) as the most suitable and readily available messaging standard to support technologies. PADIS message standards shall be used for the transmission of data. Development of messaging standards shall be in accordance with the provisions of Resolution 783.

1.2.3. Such standards shall enable any third party (approved) channel to access airline content directly from the carrier.

1.2.4 With due consideration for established business processes, procedures and current system functionality, there should be no constraints driven by any requirement for backwards compatibility. Airlines may wish to establish a roadmap for migration showing justification for backwards compatibility only if there is a defined business need.

1.2.5 Enhanced Airline Distribution shall:

1.2.5.1 allow individual carriers to determine its own prices and the nature of those products offered, depending on who the requestor is and what they are requesting. This will require authentication and the provision of historical data based on previous transactions,

1.2.5.2 facilitate the implementation of a 'shopping basket' capability concept allowing for the consumer to add or remove items from their basket as they choose. Each of these choices can trigger a "re-pricing" of the offer(s) provided by the airline,

1.2.5.3 support distribution of new products as well as changes and amendments of existing orders,

1.2.5.4 facilitate a transparent display of products being offered and enable comparison among different products, benefiting the consumer,

1.2.5.6 ensure authentication requests for product or services include all applicable IDs, such as IATA number, passengers Frequent Flyer number, valid email address or any other acceptable form of identification that is flexible to the individual carrier.

1.2.6 All data will be distributed across all channels, subject to the terms and conditions determined by the airline distributing the content.

1.2.7 This distribution model assumes that each airline distributing its individual products and services is the owner of its own content.

1.2.8 Product attributes structure should be standardized to facilitate consistent display of the product offer on third party web sites.

1.2.9 Any cost attributable to this new business model, from IT research development to implementation/operation, will not be incumbent on Members who do not wish to adopt it.

2. DEFINITIONS

For the purpose of this resolution the following definitions will apply:

2.1 ANCILLARY SERVICES means anything outside of product attributes (optional or discounted).

2.2 AUTHENTICATION means the process by which a system identifies an individual or a business entity to make sure that the user or the business entity is who they claim to be, based on attributes that are sent in a message.

2.3 DYNAMIC AIRLINE SHOPPING APPLICATION PROGRAMME INTERFACE (DAS API) means a set of routines, protocols and tools for building software applications capable of processing interactive messages from a requester to an airline rules engine.

2.4 EXTENSIBLE MARK-UP LANGUAGE (XML) means a simple, flexible mark-up language which enables the exchange of a wide variety of data on the internet and supports the implementation of a wide range of web services.

2.5 INTERMEDIARIES means any entity that has the capability to interface with an airline's DAS API (e.g. metasearch engines, distribution channel IT solution providers, travel agents including online agencies, travel management and corporate travel companies, high street agencies, specialist agencies, tour and cruise line providers) and interline partners making a booking request.

2.6 PRODUCT ATTRIBUTES means what is bundled and included in the fare, e.g. flat bed seat, in-flight entertainment, pre-reserved seating, meals etc.

2.7 PRODUCT OFFER means the response including product attributes and ancillary services capable of being displayed in the requesting system.

2.8 RULES ENGINE means the repository of an airline's business rules capable of receiving and responding to requests to provide a product offer.

3. BUSINESS PROCESS DESCRIPTION

3.1. The Business Process Description comprises the following:

3.1.1 Authenticate and Shop Process Description

3.1.1.1 The authentication and shopping process is a dialogue that is generated from a direct or indirect distribution channel to an airline rules engine via a DAS API to request a product offer from a carrier and will allow such carrier to respond with the offer based on the information received in the request. The request shall include but not be limited to:

3.1.1.1.1 data to identify who is making the request where an intermediary is present. Data may include, but not be limited to:

specific IATA number (generic numbers shall not be sent),
agent's pseudo city code,
electronic reservations service provider number,
corporate or group identification,
type of trip (e.g. leisure or business).

3.1.1.1.2 data to identify on whose behalf the request is being made. Data may include, but not be limited to:

Name/Age/Marital Status,
Contact Details,
Frequent Flyer Number or Profile number,
Customer Type (e.g. adult/child),
Travel History,
Nationality,
Shopping History,
Previously Purchased Services.

3.1.1.1.3 attributes data for what is requested. Data may include, but not be limited to:

Point of Sale,
Travel Dates,
Origin and Destination,
Number of Passengers and passenger type,
Trip type (e.g. open, round trip, one way).

3.1.1.2 Personal information that may be passed will be as bilaterally or multilaterally agreed with due consideration for compliance with all government privacy laws.

3.1.1.3 Upon receipt of a request, the carrier shall respond with a product offer. The offer should include but not be limited to:

unique request identifier,
a description of the product attributes,
a list of optional ancillaries for example,
    bundle information,
    name of optional ancillaries,
    charges,
    link if applicable,
discounts and special offers *(optional),*
product availability warnings *(optional),*
promotional codes and discounts *(optional),*
terms and conditions associated with the offer,
expiration of offer.

3.1.1.4 Multiple repetitions of this dialogue process shall be provided.

3.1.2 Order Process Description

The Order Process is a dialogue that is generated from a direct or indirect distribution channel to an airline rules engine via a DAS API that will confirm the commitment to purchase. This may also include payment information. The order process will provide the carrier the opportunity to fulfill the transaction, create the booking record, issue the document(s) and respond with confirmations.

3.1.2.1 The commitment to purchase data to enable the booking to be made may include but not be limited to:

passenger details,
name,
address,

date of birth,
gender,
passenger profile information,
frequent traveler number,
special requests,
payment information if applicable.

3.1.2.2 upon receipt of an order, if payment information is not received, carriers shall respond with either a request for payment or an option to hold the product offer either with or without a fee.

3.1.2.3 upon receipt of payment data, carriers will create the reservations records and issue the traffic documents (electronic tickets and/or electronic miscellaneous documents as applicable) and respond with a confirmation. This confirmation should include but not be limited to:

Ticketing Information and receipts in accordance with the provisions of Resolutions 722f, 722g, 725f or 725g as applicable,
Terms and Conditions of the offer,
Legal Notices.

3.1.2.4 Carriers, that have confirmed or requested interline space shall ensure that reservations and ticketing data is communicated to their interline partners in accordance with the provisions of standard industry messages published in AIRIMP-Passenger and the UN EDIFACT and XML standards as published by IATA under the provisions of Resolution 783.

3.1.3 Change Process Description

3.1.3.1 The Change Process is a dialogue that is generated from a direct or indirect distribution channel to an airline rules engine via a DAS API that will request a modification, addition, cancellation or refund to an existing confirmed order. The request shall include data that enables a carrier to identify the original order. The request shall also include authentication and attributes data as shown in 3.1.1.1.1 through 3.1.1.1.3.

3.1.3.2 Upon receipt of a change request, carriers may revise the product offer and respond back to the requestor. Carriers shall respond based on the provisions of 3.1.1.3 or deny the change request.

3.1.3.3 Changes to interline bookings should be effected in accordance with the provisions of paragraph 3.1.2.4.

3.1.3.4 Fulfillment of a revised order shall be in accordance with the provisions of 3.1.2.

Attachment A

PASSENGER DISTRIBUTION MANAGEMENT GROUP

1. ESTABLISHMENT OF THE MANAGEMENT GROUP

A Passenger Distribution Management Group hereinafter referred to as the Management Group is established for managing the development of passenger distribution processes and standards as published in IATA Resolutions and Recommended Practices, and the development of modern technology messaging standards (e.g. XML) under the provisions of Resolution 783.

The Management Group shall report to the Joint A4A/IATA Passenger Services Conference (JPSC) and shall consist of up to fifteen (15) members appointed by the JPSC. The Management Group shall include representatives from airlines and shall be able to invite other interested parties (e.g. IATA Strategic Partners and all other third party industry stakeholders) as required from time to time to reflect the multi-stakeholder nature of the passenger distribution process.

The JPSC will ensure that the membership is so constituted that adequate expertise is maintained.

2. FUNCTIONS OF THE MANAGEMENT GROUP

The main functions of the Management Group are:

2.1 to review and approve proposed additions, changes and deletions to the key principles of passenger distribution;

2.2 to manage the development of processes and standards;

2.3 to submit an annual report of its activities to the JPSC meeting;

2.4 to liaise closely with other A4A and IATA Committees impacting on passenger distribution standards.

3. MEETINGS OF THE MANAGEMENT GROUP

3.1 The Management Group shall meet as required but not less than once per year. A quorum shall consist of not less than one-third of the Management Group members.

3.2 The Management Group shall elect its own Chair-Person and Vice-Chairperson from IATA and A4A member airlines.

3.3 Any IATA or A4A Member who is not a member of the Management Group may attend Management Group meetings and may vote on any issue except the nomination of officers.

3.4 Decisions of the Management Group shall be by an 80% positive vote of the IATA and A4A Members present at the meeting and entitled to vote. Abstentions do not count in the voting.

3.5 The Management Group shall determine its own working procedures and may establish sub-groups as it determines necessary.

4. AMENDMENT PROCEDURES

4.1 Proposals to amend the passenger distribution standards may be submitted by the passenger distribution sub-groups, any A4A or IATA Member, or members of the IATA Strategic Partners Program.

4.2 The Management Group shall consider all such proposals and shall act upon them as follows:

4.2.1 Adopt the proposal if accepted by 80% of the IATA and A4A Members entitled to vote on such proposals;

4.2.2 Reject the proposal;

4.2.3 Refer the proposal to the next Management Group meeting for further review;

4.2.4 If the proposal is in conflict with existing industry standards, refer the proposal to the next meeting of the JPSC for further review and resolution.

4.3 All amendments agreed by the Management Group shall be circulated to all IATA and A4A Members within thirty (30) days of the Management Group meeting.

4.4 In determination of its working procedures, the Management Group may utilize a mail vote procedure to progress proposals to amend passenger distribution standards between Management Group meetings. Utilization of the mail vote procedure is limited to amendments of an urgent nature and which are requested by or supported by five (5) or more Management Group members. Adoption of proposals using the mail vote procedure will follow the above amendment procedures.

4.5 Amendments endorsed by the Management Group shall be forwarded to the JPSC for final adoption.

5. PASSENGER DISTRIBUTION IMPLEMENTATION MANUAL

Whilst developing and enhancing the resolutions and messaging standards for the implementation of enhanced airline distribution it is acknowledged that there are a number of items that, whilst not appropriate for inclusion in the resolution text, are fundamental to obtaining a clear understanding of how enhanced passenger distribution is implemented.

Further, given the variety of stakeholders, there is significant benefit in documenting various aspects of the overall processes to promote a common understanding and standardized approach to enhanced distribution implementation. Consequently the Management Group shall oversee the development of a Passenger Distribution Manual which provides clarifications and explanations of the functions related to Enhanced Airline Distribution as well as guidelines and best practices in accordance with the requirements as documented in this resolution.

5.1 The Passenger Distribution Implementation Manual shall contain:

- An end-to-end Passenger Process,
- A Passenger Process Toolbox covering the end-to-end process,
- Recommended Practices,
- Technical Specifications,
- Implementation Guides,
- Templates for Service Level Agreements.

5.2 A new edition of the Passenger Distribution Implementation Manual shall be issued as and when determined by the Management Group and in consultation with the Secretariat.

Mr. BACHUS. Thank you.
Professor Sagers.

TESTIMONY OF CHRISTOPHER L. SAGERS, JAMES A. THOMAS DISTINGUISHED PROFESSOR OF LAW, CLEVELAND STATE UNIVERSITY

Mr. SAGERS. Thank you very much. So my friend, Diana Moss, of the American Antitrust Institute told me that I should be getting hazard pay for being here today. And I am here, I am afraid, to suggest some reasons not to be so optimistic about this merger. I will notice that there are kind of a lot of captains uniforms behind me, and I have to say I am a little afraid that when I leave here to go home to Cleveland today, I am going to be on some sort of no fly list. And I hope that is not true.

Mr. BACHUS. They are all very friendly, I can tell.

Mr. SAGERS. I am sure they are. I am not going to say what airline I am on. And I will note as well that Dr. Winston, who I think is—he is only coincidentally to my left, and he is also going to probably say a few things in disagreement with me. He is an eminent person. No person could study the antitrust treatment and competition in airline markets without studying his work. And yet he and I are going to disagree about a few things.

But the most encouraging thing I have heard today so far is Chairman Goodlatte's statement, which I was very pleased to hear describe antitrust law as non-ideological. And I could not agree more. It is non-ideological.

I do not have, you know, my own phalanx of supporters behind me, and indeed I do not have any staff to come help support me in these sorts of things because I am only here to speak in favor of a policy that is supposed to protect everybody, including us average folks. And so guys like me come and talk about it alone.

So here is my basic thought in the very brief time I have to describe this complex deal.

I think that in policy consideration of transactions like these, complexity is the defendant's friend. Complexity is the merging party's friend. It is not the friend, though, of most other people that are affected by the transaction. I want, therefore, to try to describe a few things that, to me, seem relatively simple.

First of all, there will be a lot of discussion, and it is going to seem complex because it seems to require a lot of understanding of complicated industry facts, of benefits proposed by the merger. Right? There is a lot of complexity surrounding the purported benefits.

I am not even really going to talk about the benefits. I personally do not think they are worth dwelling on, at least not in this setting, because we all, every single one of us, have been to this rodeo before. We have seen many many mergers in many industries, and we have seen many mergers in the airlines in the 35 years since deregulation. And they have always been said to propose these same benefits or benefits like them, and quite often they have been disappointing. My sense is that the promises are typically not kept, and they have led to sometimes very painful disappointments.

I am going to talk instead about what I also think is relatively simple, and that is the competitive effects. There is not time for me

really to address it fully, but I will say this. In the written statements that I read last night, and I read them all, the most remarkable statement was that in this merger, among the thousands and thousands of daily flights to cities all across the United States that are controlled by these 2 carriers, the only overlaps that matter in the whole combined network will be 12 overlaps, 12 flights. We could delve into some complexities. I would rather focus on what seems to me simple. We should ask ourselves, among those thousands and thousands of flights, are there really only 12 cities in which these 2 carriers provide competition with each other that would be lost through this merger? I do not think so.

For a brief introductory analysis to what are the more likely effects, you can look at the white paper produced by the American Antitrust Institute, which is attached to Mr. Mitchell's written statement.

The final thing I will say, and unfortunately I have a very brief remaining time to say it, is that a dominating theme of all discussion of airline mergers since deregulation has been the economic difficulties of the carriers. The claim is we have to merge. We have to consolidate to strengthen ourselves so that we can perform.

Here are a few thoughts about that. First of all, the carriers really have never offered any very plausible explanation why merger. It has to be merger that is going to solve our economic problems. They can and they often have suggested a lot of detailed arguments.

But again, I think the response is a relatively simple one, and it is that, well, we have had a long time. We have had 35 years with dozens of mergers, every single one of which has been sold on the claim that synergies, cost savings, et cetera, are going to make us competitive. It has not worked. The airlines have remained—the legacy airlines, at least, have remained mostly economically in dire straits throughout that whole time.

With that I will end. Thank you.

[The prepared statement of Mr. Sagers follows:]

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STATEMENT OF CHRISTOPHER L. SAGERS
James A. Thomas Distinguished Professor of Law
Cleveland State University

Before the
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

of the
COMMITTEE ON THE JUDICIARY,
UNITED STATES HOUSE OF REPRESENTATIVES

Concerning
"COMPETITION AND BANKRUPTCY IN THE AIRLINE INDUSTRY: THE PROPOSED MERGER OF AMERICAN AIRLINES AND U.S. AIRWAYS"

February 26, 2013

Chairman Bachus and members of the Subcommittee, my name is Chris Sagers and I am a professor of law at Cleveland State University in Cleveland, Ohio. With my gratitude I am pleased to offer these thoughts on antitrust aspects of the proposed merger of American Airlines ("American") and U.S. Airways. I have studied the law of antitrust

and regulated industries throughout my career, and I have published on competition in regulated sectors, including the airlines and other transportation industries.[1]

Two themes have dominated airline competition policy since deregulation, and they have driven discussion of every airline merger. Merging airlines have used them to conceal seriously anticompetitive transactions, preserve pockets of market power, and perpetuate an inefficient, high-cost industrial organization. Those themes are: (1) the industry's purportedly special problems, which are said to relate to its high costs or to technological issues, and (2) its persistently poor economic performance. Each time a new merger is proposed, the merging parties argue that they cannot alone survive the forces of unrestrained competition, explain that inability according to such detailed cost-based arguments as they can muster, and point to their own prior bad performance as proof of it. But each time, despite their predictions to the contrary, the mergers that are then approved are followed by price increases on those city-pair routes where concentration has increased, and by continued poor economic performance.

The industry and its defenders have argued in various ways that the fault is with special problems in airline markets. Indeed, the parties to the present proposed merger allege that American requires it to emerge from bankruptcy. But a much better explanation, which doesn't require believing that airline markets are somehow different than virtually all of the other markets in the United States, is a simple one. The legacy carriers have remained high cost, but through well protected pockets of market power and anticompetitive conduct they have been able to acquire or exclude almost all of the many

[1] I do not represent any party with any interest in this matter. I have received no compensation in connection with my testimony, I appear here at my own expense, and the views expressed are my own. I submit this testimony at the request of counsel for the Subcommittee.

low-cost carrier entrants ("LCCs") that have challenged them since deregulation. Failure to enforce the antitrust laws against these many mergers, in other words, has preserved inefficient firms, kept them from performing adequately, and kept prices high, in just the way that basic economics would predict. The great irony is that competitive markets, which the incumbent airlines have kept at bay by stressing their allegedly special problems, could have driven the very efficiencies needed for healthy economic performance.

I. Background

While the airlines are now subject to antitrust like most other firms, and while major airline mergers must be approved by the Department of Justice, there has in effect been little antitrust policy in the airline industry. The industry began its history in the 1920s in a heavily regulated state, stayed that way until the process of deregulation began in the late 1970s, and then entered a period of essentially deregulated competition that has been rocky and quite different than deregulatory planners had anticipated. Since deregulation, the industry's history has consisted of three, roughly decade-long blocks punctuated by two separate bouts of new entry and vigorous competition which relatively quickly were snuffed out by failure or acquisition of all new entrants.[2]

Deregulation was followed by a frenetic burst of new entry, and the industry experienced vigorous competition for the first time in its history. However, during a short transitional period following deregulation, the merger review authority of the former Civil Aeronautics Board was temporarily transferred to the Department of

[2] *See generally* Chris Sagers, *"Rarely Tried, and . . . Rarely Successful": Theoretically Impossible Price Predation Among the Airlines,* 74 J. AIR L. & COMM. 919, 936-41 (2009).

Transportation ("DOT"), before it was finally vested in the Department of Justice ("DOJ") in the 1980s. During that brief period, the DOT approved no fewer than twenty-one separate mergers and rejected none, even though the DOJ appeared in an advisory capacity and vigorously opposed several of them. This period also saw certain developments deregulators had not foreseen—most importantly, the rise of the "hub-and-spoke" system and the development (by American, tellingly) of a uniquely sophisticated, highly successful system of price discrimination known in the industry as "yield management."

Next, beginning in about 1993, as the economy generally emerged from downturn and the then-still small Southwest Airlines began to convincingly demonstrate the possibility of selective, low-cost competition against the majors, another flurry of entry ensued. That period was destined to be short as well, however, and again by late 1990s or early 2000s, the entrants had almost all failed or been acquired by major airlines. Indeed, virtually every new entrant in the industry's entire history since deregulation has either failed or been acquired.[3] Since then, in any case, competition has been more muted, and the major carriers have also executed a series of large consolidating mergers, but the industry's economic performance has still been uniformly poor. The legacy carriers have failed to earn profits in all but a handful of the years since deregulation, and several of them have undergone one or more bankruptcy reorganizations or been liquidated entirely.

A persistent theme of this lackluster history has been allegations of anticompetitive conduct by the legacy carriers. Most importantly, it has been alleged by

[3] *Id.*

private industry participants, federal agencies and even the most esteemed of outside observers[4] that legacy carriers have engaged in selective predatory pricing attacks to exclude entrants from city-pair routes where they enjoy dominance—and especially new industry entrants or LCCs that have operated elsewhere.[5] However unlikely price predation may be in the typical market—a topic of much debate—a number of factors suggests its likelihood in deregulated airline competition. The overwhelming empirical evidence shows that the legacy carriers have each managed to establish pockets of significant market power at their hub airports,[6] and because they compete only in discrete city-pair markets, any act of predatory pricing will expose them to temporary losses on only one route. Moreover, given the high capital outlays of genuinely new airline entry, a relatively few bouts of successful predation are probably sufficient to dry up capital market access to new entrants.[7]

Throughout this period, airlines have proposed many, many mergers and acquisitions, and, even after the DOJ took over their review in the 1980s, the antitrust authorities have approved almost all of them. The DOT never blocked any transactions, and the DOJ has blocked only one large one, the proposed acquisition of U.S. Airways by United Airlines in 2001. In the present period of significant concentration and mostly slack competition, only a handful of major airlines still exist. Following several very

[4] *See, e.g.,* Statement of Alfred E. Kahn before Comm. on the Jud., Subcomm. on Antitrust, Bus. Rights & Competition, U.S. Senate, *Airline Competition: Clear Skies or Turbulence Ahead?,* 106th Cong., 2d Sess. (May 2, 2000).

[5] Economists and lawyers typically describe pricing as "predatory" if it is below cost (or at least sacrifices some profit) and is intended to force some competitor to exit the market or raise its prices.

[6] *See* Sagers, *supra* (collecting econometric reports).

[7] *See* Sagers, *supra* (elaborating these points at length).

large mergers in just the past few years,[8] all of them unchallenged by federal authorities, the proposed American/U.S. Airways deal would leave the sector with only four major players: United, Delta, American and Southwest. Nationally, those four firms will hold more than 70% of airline travel. But much more importantly, they will enjoy discrete pockets of much more power dominance in any number of city-pair routes—specific routes served only be one or two other carriers, where they are known to charge higher rates—and will face meaningful challenge in only some markets by the small number of remaining law cost carriers ("LCCs").[9]

And above all, the evidence is clear that in those many specific city-pair markets on which legacy firms have been able to keep their competition to only one or a few other carriers, they have increased their prices.[10] Consolidations have also ordinarily been followed by some job losses, in part because merging firms typically close the smallest of the hubs in their combined networks. Job losses and the closing of hubs are described as

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[8] There have been six major mergers since 2005: (a) U.S. Airways/America West in 205, (b) Delat/Northwest in 2008, (c) Republic Airlines' acquisitions of both Midwest and Frontier Airlines in 2009, (d) United/Continental in 2010, and (e) Southwest/AirTran in 2010. *See* Diana L. Moss & Kevin Mitchell, *The Proposed Merger of U.S. Airways and American Airlines: The Rush to Closed Airline Systems* (American Antitrust Institute & Business Travel Coalition, August 8, 2012).

[9] Among the LCCs that remain, really only three are large and secure enough to offer serious fare competition—JetBlue and Spirit, along with Frontier following its forthcoming spin-off from Republic. *See id.*

[10] Some sympathetic to the industry have defended the present merger by observing that *average* airline fares risen at a rate roughly comparable to inflation for the past several years. *See* Pablo T. Spiller, *Why American-US Airways Deal Is Good*, CNN OPINION, Feb. 18, 2013, *available at* http://www.cnn.com/2013/02/18/opinion/spiller-airline-merger. But a focus on national average prices is *extremely* misleading. Airline markets are not national in scope. An airline does not set one fare price for all its flights nationally; it sets rates for each individual city-pair route that it serves, and rates are known to vary depending on how many other carriers serve that route. So it is very possible for overall average airline rates to advance at a pace like prices in other markets, even though discrete city-pairs lacking much competition see much faster rate increases.

"synergies" or the achievement of "efficiencies," but they are best understood as simply the reductions in output predicted by elementary economics in any case of increasing market power.

II. The Effects of an American/U.S. Airways Merger

A. *Expect Higher Fares in Specific City-Pair Markets, and Some Job Losses*

There is no reason to expect an outcome any better in the proposed deal than has followed the many other airline mergers during the thirty-five years since deregulation. That is to say, the merged firm's financial performance is unlikely meaningfully to improve, but it is likely to raise fares and limit service over significant portions of its network, as well as to reduce its workforce and close one or more of its hubs.

Unforunately, it is not a terribly good answer that the DOJ may be able to impose more limited remedies on the merging parties than blocking their play completely. The major problem with the existing antitrust approach to airline consolidation is that the antitrust agencies and the courts lack any resolve actually to stop major mergers, but the limited alternative remedy they are willing to support is likely to be ineffective. On the one hand, neither government officials nor the American public has any stomach for business failure. And it superficially seems, given the airlines' poor performance, that without continued consolidation the legacies' only option is consolidation. But without blocking transactions completely, the DOJ's only alternative is to require the parties to divest some of their "slots" on particular city-pair routes where competition would be unacceptably reduced by the particular transaction. (DOJ will surely require at least that in this particular transaction as to about a half-dozen city-pairs, on which the parties would otherwise enjoy complete monopoly.) The problem is that the only potential

purchasers While there are a few remaining LCCs that have some wherewithal to compete, the only LCC whose entry has ever persistently driven down fares in city-pair markets is Southwest, and Southwest has now achieved a nationwide presence of its own, and its costs are believed to have risen as well. All other LCCs to have seriously challenged a legacy carrier on a city-pair that it dominated has exited, or indeed has been acquired or failed completely. And while slots might be offered to other legacy carriers, instead of an LCC, the post-merger legacies will effectively be operating within a four-firm oligopoly, and widely accepted economic theory predicts that they cannot be expected to seriously compete on any except their most competitive routes.[11]

B. *Poor Economic Performance Is Perfectly Consistent With Market Power and High Prices*

Finally, there is little significance in the fact that American is emerging from bankruptcy or that either carrier has faced financial difficulty. First, that legacy carriers have found vigorous price competition difficult is explained less well by any special characteristic of their markets or technology, and much better by the persistence of their high costs relative to most firms to have entered since deregulation. Second, poor financial performance is perfectly consistent with market power or even full monopoly, because efficiency typically suffers firms acquire market power. As a commonplace of economic theory, where there are supracompetitive profits to be found, firms can be expected make socially wasteful investments to acquire or maintain it,[12] and to indulge in

[11] *See generally* George Stigler, *A Theory of Oligopoly,* 72 J. POL. ECON. 44 (1964).

[12] See Richard A. Posner, *The Social Costs of Monopoly and Regulation,* 83 J. POL. ECON. 807 (1975);

organizational "slack" once it is gotten.[13] In fact it is now generally taken for granted in the theory of corporations or the theory of the firm that the only force that can effectively preserve internal productive efficiency is product market competition.[14]

[13] *See* Harvey Leibenstein, *Allocative Efficiency vs. X-Efficiency*, 56 AM. ECON. REV. 392 (1966); Harvey Leibenstein, *X-Inefficiency Xists—Reply to an Xorcist*, 68 AM. ECON. REV. 203, 211 (1978); Harvey Leibenstein, *On the Basic Proposition of X-Efficiency Theory*, 68 AM. ECON. REV. 328 (1978).

[14] *See generally* Einer R. Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 299–300 (2003).

Mr. BACHUS. Mr. Winston or Dr. Winston.

TESTIMONY OF CLIFFORD WINSTON, SENIOR FELLOW, ECONOMIC STUDIES PROGRAM, THE BROOKINGS INSTITUTION

Mr. WINSTON. Thank you. I am happy to be able to testify at this merger. I testified at the Delta/Northwest merger in 2008 in support of that merger, and I support this merger. But I have some new perspectives to bring. I am not just going to read my old testimony. And what I think I will do in the short amount of time, given what we have heard, is repackage my written presentation in my oral presentation, beginning with my conclusion.

All mergers, not just airlines, involve what we are to call the Williamson tradeoffs; that is, mergers trade off benefits from economies and expansion to get lower costs, okay. That is the positive claim to them. And then the anti-competitive concern that you are losing a competitor and that you will raise prices. So traditionally, when we think of these things we start off with tradeoffs, and naturally, you know, you will hear them and you have heard them, as expected.

What I think is interesting now about airlines, and I did not stress this enough before, but I think it is increasingly true now, is we do not have to think of these any more as tradeoffs. Now admittedly, I will be bringing in an additional policy perspective, but I think that was appropriately done by Mr. Mitchell raising just concerns about what is going on with how tickets are distributed.

And that additional policy perspective is the growing reality of where this industry is going, and that is the globalization. This is a global airline industry, right? We have to see where are we really going to be going. And when I mean globalization, I mean full open skies, something we have been moving toward, and ultimately cabotage, which is allowing foreign carriers to serve in the U.S.

And, you know, if you think that is a strange policy, consider the automobile industry and imagine what it would be like if we did not have Honda, Toyota, et cetera, building and assembling cars here. And one wonders what is wrong with a picture like that when that is the case in autos, but we do not allow British and Irish planes to fly in the U.S.

All right. Once you bring that perspective into mind, things change radically. You do not have tradeoffs. In other words, it is quite clear that with the airline's job to be as efficient as possible, okay, and reduce costs, and what policy makers' job to do is to promote globalization and policy, promoting open skies, finish the job with that, and cabotage. What that will do is give you your influx of competitors to make sure that the efficiency improvements are largely transferred to consumers. And so the concerns about competition just go out the window once you start thinking about that.

All right. But something else very important becomes clear then. You get a deeper and, I think, more intuitive understanding of why carriers are merging. Think about what airlines really involve. It is a very risky investment, okay? And billions of dollars of seats that are in the sky, all right? And it is risky because there are lots of shocks that I will get to shortly, all right.

What you want to do deal with risk, as we know, is to have a portfolio, and you could allocate those seats in response to shocks

and risks. And in a globalized economy, then you can imagine what people will do. When things are tough in one place, they will move their capacity to another place, all right. Mergers enable you to do that.

So I would suggest that the main justification for mergers which really has not been emphasized enough is really a way of dealing with risk, which is the inherent challenge in this industry.

All right. So let me turn to that, why I think that. This all comes out of deregulation, you know. You can recall, but you have read, that airlines operated with a load factor of 55 percent, so they have billions of dollars in capacity, and they are using only half of it. So, you know, in retrospect you can just see how crazy regulation was. What a waste, all right? But at the same time, airlines were shielded from the fundamental challenge; that is, matching capacity with demand and these shocks.

So you have to commit to capacity to buy planes in advance, and you think you know what demand is. And then you have got to deal with fuel shocks, macroeconomic shocks, the Gulf War, September 11th, and, to top it off, sequestration, all right? That is really a very challenging thing to do.

So what do you want to do? You want to have the ability to diversify, right, and be able to allocate your seats appropriately. That is what mergers do, and that is why the airlines have been doing it for all these decades, I would contend.

Now, in the process of doing that, what do we see going on in the industry? What are the long-run trends? Well, real prices continue to go down. They continue to be below the SIFL, the standard industry fair level, under regulations, so the benefits of deregulation are preserved. And most importantly, load factors are going up. That is the key efficiency thing that we want to look at. We are not operating at 55 percent. We are much closer to 80 or 90.

So I would suggest that, you know, these mergers are just part of a tool. They are not the only tool, but to deal in the long run with where this industry is going, and that is globalization.

Now, I believe in the end, you know, Congress is critical here in pushing for that, all right? And then we get a win-win, and then presumably then the airlines should go along with it. We are allowing you to be more efficient. You allow us to spur competition in this industry.

[The prepared statement of Mr. Winston follows:]

The American Airlines-US Airways Merger In

An Evolving Airline Industry

Statement of

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Introduction

In a 1995 book, *The Evolution of the Airline Industry*, Steven A. Morrison and I assessed the effects of various hypothetical changes in airline competition on air travelers' fares. An extreme scenario that we considered was that Alaska, Continental, America West, Northwest, TWA, and USAir exited the industry, leaving Southwest, United, American, and Delta as the only major carriers in the U.S. domestic market. At the time, we thought this large scale exit would be a tremendous shock to industry competition—note, we did not assume that the carriers exited by merging with other carriers. We found, however, that fares increased modestly, about 8 percent, which preserved most of the decline in fares due to deregulation. We attributed our finding to the ability of Southwest to enter additional markets and discipline fares.

Today, this extreme scenario no longer seems so extreme because if American's proposed merger with US Airways is approved, then, with the exception of Alaska, all the carriers that we assumed would exit the industry would have done so. My testimony provides some perspective on this scenario, indicates why its effects on fares would differ from the prediction that we reported in our book, and assesses U.S. airlines' merger activity in the broader context of the industry's eventual evolution to a highly competitive, global airline industry.

The Scenario and Reality

The scenario we posited in our book differs from an actual post American-US Airways merger environment because we assumed that carriers would simply exit the industry and would not merge and because we accounted for competition among only four remaining carriers.

In our scenario, when a carrier was assumed to exit a market, all of its assets exited with it. This assumption ignored the potential benefits of a merger and overstated the exiting carrier's effect in raising fares because its assets could have been put to more effective use if that carrier merged with another carrier, thereby creating a more efficient competitor. Indeed, retrospective empirical assessments of airline mergers have generally found that the presence of a merged air carrier in a market does not lead to higher fares. At the same time, travelers benefit from the merged carrier's more extensive network and from more opportunities to use frequent flier miles.

Our scenario also did not account for the fact that in addition to American, Delta, United, and Southwest, the carriers that would still compete in the industry include Alaska, JetBlue, Spirit, Frontier, Virgin America, Allegiant, and Hawaiian Air among others.

Accordingly, even though for the last decade or so the U.S. airline industry has been evolving in a way that is consistent with the extreme scenario in our book, as shown in Borenstein and Rose's recent paper reporting U.S. airline industry operating characteristics through 2011, real yields have continued to decline since deregulation in 1978; real yields have been consistently below the Standard Industry Fare Level (SIFL)

that was used by the Civil Aeronautics Board to determine regulated fares; low-cost carriers' market share has steadily increased; route level concentration on hub and non-hub routes has stabilized during the past ten years; and the industry average load factor (the percentage of seats filled by paying passengers) has steadily increased. And, as reported in Tomer, Puentes, and Neal's Brookings study, travel in U.S. international markets has more than doubled between 1990 and 2011 as U.S. carriers have taken advantage of open skies agreements to expand their international networks and increase flight frequency.

Similar to the mergers that preceded it, the merger of American Airlines and US Airways would preserve those positive long run trends. Carrier competition would continue to be intense and low-cost carriers would continue to put downward pressure on fares. Entry and exit would continue to be fluid in airline markets as a merged American and US Airways would optimize its network by exiting some routes and entering others, while other carriers would adjust their networks by entering some of the routes that American exited and exiting some of the routes that they entered. The merged American and US Airways would also strengthen its international network and benefit travelers by serving more foreign destinations.

In retrospect, the extreme scenario depicted in our book previewed a natural evolution of the industry in response to deregulation with the critical caveat that instead of completely exiting the industry, certain carriers have merged with others, which has enabled the industry's capital stock to become more productive as, for example, merged carriers have been able to retire their least efficient aircraft more quickly and has enabled the merged carriers to strengthen their international networks.

Toward a Global Airline Industry

A proposed merger between large firms is often accompanied by concerns that the consolidation would reduce competition and raise prices. If policymakers are concerned that the proposed American-US Airways merger may have anti-competitive effects, notwithstanding any gains in operating efficiency, then an effective way to address those concerns, obtain the efficiency gains, and significantly benefit travelers would be to take steps to stimulate addition competition by creating a deregulated global airline industry.

In fact, U.S. and foreign policymakers have already begun that process by negotiating open skies agreements, which give U.S. and foreign carriers the freedom to enter and set fares in U.S. international markets. As expected, air travelers have benefited. In a recent paper, Jia Yan and I estimated that the reduction in fares and increase in flight frequencies in markets that are governed by open skies agreements has raised travelers' welfare $5 billion annually. If the United States negotiated agreements with foreign countries so that all U.S. international routes were governed by open skies, we estimate that travelers would gain an additional $5 billion annually.

The final step to create a highly competitive global airline industry would be for the United States to allow foreign airlines to serve U.S. domestic markets. (Other countries

should also allow foreign carriers, including U.S. carriers, to serve their domestic markets.) Clearly, competition would be even more intense in U.S. markets and travelers would benefit from lower fares and service improvements if their choice of carriers were expanded to include discount carriers like Ryanair and global players like Qantas and British Airways. Such airlines have never posed a threat to national security or to the safety of air travelers.

Whether it was part of their grand design, U.S. carriers have been preparing for decades for a truly competitive global airline industry. As part of this process, they decided that mergers would help them develop more efficient operations and networks. No evidence exists to question the effectiveness of that strategy; hence, policymakers have been wise to allow consolidation to move forward and they should allow American Airlines and US Airways to continue the process. Policymakers should also accelerate the airline industry's contribution to globalization by creating a truly competitive deregulated environment that would benefit travelers in the United States and throughout the world.

Mr. BACHUS. Thank you. We will now proceed under the 5-minute rule with questions, and I will begin by recognizing myself for 5 minutes.

One thing, Mr. Mitchell, that you and Professor Sagers did not address, you talked about some possible negative implications of this merger. But if it does not go through, and there are some demonstrable negatives, very many, and I just wonder if you considered that. For instance, a failure of American Airlines being financially unsustainable.

Mr. MITCHELL. Well, American Airlines is exiting or will exit bankruptcy reorganization as a lower-cost carrier with billions of dollars in cash and cash equivalents, and new aircraft are on order. And their CEO has said countless times that they will be profitable as a stand-alone carrier. Likewise US Airways is enjoying some of its most successful earnings in its history.

So I just do not buy into the notion that these are failing firms. It certainly does not apply as a failing firm against the guidelines, the antitrust guidelines. They are fit and able to compete. And to make the argument, as you hear now, then that they need to be large enough to compete effectively with the new Delta or the Continental-United, well, they claim themselves they can compete against them. If you use the logic that you always have to get bigger to compete with the next biggest carrier, we are going to end up with two mega carriers. I mean, the logic is flawed.

And then finally, there are many smaller independent carriers that just do quite fine mixing it up.

Mr. BACHUS. Okay.

Mr. SAGERS. I would like to very briefly add one thing because I think this seems like the biggest issue, right, if we are going to have a huge business failure, we have to do something.

My first point is I agree with Mr. Mitchell that it is unlikely. We do not see airline liquidations that often, despite the huge financial difficulty the industry has had in 35 years.

Much more importantly, we all have had a very painful, unhappy experience during the past few years with this same basic problem, which is that we in the United States do not have the stomach for business failure. By not being willing to tolerate it once in a while, we create a very serious problem, which is that firms that know that they will be rescued fail to learn how to compete in difficult markets, okay? And in this case the subsidy——

Mr. BACHUS. Let me say this. We have a bankruptcy law which allows you to go into bankruptcy, and then it allows the creditors, the company, the pension, the CBGC——

Mr. SAGERS. Right, right.

Mr. BACHUS [continuing]. To agree on the best route out of bankruptcy. And that agreement has been made.

Mr. SAGERS. We do have a bankruptcy law, but——

Mr. BACHUS. But what I am saying, what these companies are doing is exactly what the law avails of any company. And they have made a decision through the bankruptcy process that this is their best reorganization.

Now, you know, you could argue with that, but they have availed themselves of the legal process.

Mr. SAGERS. I disagree.

Mr. BACHUS. Well, I know you do. But one thing that, and I have read your statements and what you have said in the press. But airline fares, I mean, you have talked about they have escalated, but they have actually, as far as taking into account inflation, they are one of the best, they are more competitive than they have ever been. I mean, the only reason they have been as cheap as they have is investors have pumped billions of dollars into failing airlines.

And I would say this. You both mentioned that they maybe had a few more complementary routes, or not complementary, but duplications. But actually I cannot recall a merger of airlines that had fewer duplications than this.

Mr. SAGERS. I will reply if you allow me.

Mr. BACHUS. What?

Mr. SAGERS. I will reply if you will allow me.

Mr. BACHUS. All right.

Mr. SAGERS. Okay. First of all, they are not just doing what bankruptcy law allows. They are emerging from bankruptcy with a merger which is substantially uncompetitive. The subsidy that we gave to the banks during the bailout——

Mr. BACHUS. No, that is their bankruptcy plan, I think. That is legal.

Mr. SAGERS. Yes, sir.

Mr. BACHUS. I mean, that is bankruptcy.

Mr. SAGERS. That may very well be. Most people who emerge from Chapter 7 do not do it through a horizontal——

Mr. BACHUS. Well, most of them do not do it. But what they do, that is an option.

Mr. SAGERS. Yeah, unless it is illegal under antitrust laws.

Mr. BACHUS. And that is an option that the law gives them. And I would just say this. I am a railroad attorney. I remember Rock Island and where the government continued and turned them down saying it was anti-competitive and you lost 10,000 miles of rail and stranded over 4,000 shippers because you did not allow a viable merger. And I can tell you that everything I have read, this is going to make a stronger airline.

And I will say this. You could have stopped those mergers before Delta and Northwest, I will agree with that. You could have stopped it before Continental and United. But you did not, and you created other airlines with a distinct advantage if you do not let these two airlines merge.

And the employees are for this, you know. I have never seen more favorable support from employees, from unions and in a time of deficits from the Pension Guaranty Corporation, which is not unimportant.

Mr. MITCHELL. Mr. Chairman, could I add one point?

Mr. BACHUS. Sure.

Mr. MITCHELL. From ABC News, you know, we talked about the 12 overlapping routes. But there are 100 cities that these two carriers currently compete on routes. That works out to 4,900 routes.

Mr. BACHUS. Well, let me say this. If you call competing, which I saw a list that if you fly from Birmingham to D.C. and you want to fly through Dallas and take 12 hours as opposed to 2 hours from Birmingham to D.C., you can call that, if they share that route.

But I do not know of anyone that would take a 12-hour flight or an 8-hour flight when they could go non-stop.

Mr. MITCHELL. But the real point——

Mr. BACHUS. And that was on somebody's list.

Mr. MITCHELL. The real point is that the 12 overlapping routes, overlapping routes in general are not as important as they were 4 or 5 years ago.

Mr. BACHUS. All right, thank you. Mr. Cohen.

Mr. COHEN. Have all of you all flown through Atlanta? You all have?

VOICE. Atlanta?

Mr. COHEN. Have any of you all flown through Memphis? Mr. Mitchell, is it more convenient and nicer to be in the Memphis Airport or the Atlanta Airport? [Laughter.]

Mr. MITCHELL. Every time I am there, I feel like I am living the dream. [Laughter.]

Mr. COHEN. You got it, man. You have been there. Any of the rest of you been and think Atlanta is a better experience for your consumers than Memphis? Mr. Johnson?

Mr. JOHNSON. Sir, I am just not familiar with the Memphis Airport. But after your discussion about it——

Mr. COHEN. You and Mr. Anderson.

Mr. JOHNSON. I am going to see the Memphis Airport as soon as I can.

Mr. COHEN. Good. And you will like it. Is not the fact——

Mr. BACHUS. He likes the ribs, right?

Mr. JOHNSON. He likes the Rendezvous, right?

Mr. COHEN. The Rendezvous and others. But, you know, Memphis Airport is small. It is easy to get around. It smells good. You smell ribs everywhere. [Laughter.]

Atlanta is just gigantic, and the only smell you get is maybe, you know, congestion. Will US Airways-American—it will be called "American," Mr. Johnson—is there a likelihood that you would look into Memphis? And with all the things about competition, now are you going to leave Memphis to just to be the stepchild of Delta, or would you look into coming in there and providing competition, as US Airways has on the Memphis-Washington route?

Mr. JOHNSON. We think both—am I on? Both airlines serve Memphis now. We serve Memphis to a variety of our hubs. As you know from our testimony, our written testimony, the creation of the network that will come about by the New American Airlines will create opportunities to provide additional service to cities that we serve to our hubs, and we are hopeful that Memphis will be among that. But at this point in time, we have not had the opportunity to plan or talk about that, but certainly Memphis will be on our list, sir.

Mr. COHEN. Mr. Mitchell, one of the things Mr. Anderson said or others said was that since the Memphis Airport is so much better, the time that airlines have to stay on the tarmac or just approach, that they save money on fuel. Is that accurate that that would be an attraction to an airline to come to Memphis because of fuel costs just sitting on the runway?

Mr. MITCHELL. I think there is abundant evidence of that. All you have to do is look at the statements over time of Southwest

Airlines. They will, you know, stay away from any airport where expenses and charges are just a little bit too high for them. So, it makes an impact on the decision making at the airlines for sure.

Mr. COHEN. Dr. Winston, you supported the Delta-Northwest merger. When you did so, did you take into consideration the horrific conditions that would result in a city like Memphis because of this merger?

Mr. WINSTON. No, I did not. I had a broader perspective on the merger. I qualified the danger of prospective assessment of mergers because what we know is after the merger, there are so many changes in the network, entry and exit, that may relate to the merger, but in this case, as we know, probably had nothing to do with the merger because April 2008 was when we had our hearing, and the merger went forward, and then we had the great recession.

How one could isolate what the merger did versus the great recession is very, very difficult. So the great recession should have——

Mr. COHEN. Well, we had our problems in Memphis, there is truth to that. Should the great recession not have been made Memphis a better airport, as Mr. Mitchell says, because of the fact that you save money and you have less time. You are burning fuel sitting there waiting to take off as you do in Atlanta? And the great recession should have made Memphis a more profitable hub for Delta. You do not agree with that.

Mr. WINSTON. I think that the problem with a place like Memphis, as other, what we call, not the largest hubs, is traffic. And again, if you are an airline, you want to fill your plane with people, you want to go where the people are.

Mr. COHEN. Destination and origination. But nevertheless, airports have become like Federal Express except the airlines use people and Federal Express uses packages. And there are just places where you move people around. And Memphis is a good place.

But let me ask you this. Mr. Mitchell, Dr. Winston thinks it would be good to have international competition. Do you want to have Air Shanghai be our primary carrier?

Mr. MITCHELL. I personally do not fly them too much. [Laughter.]

But, you know——

VOICE. Do they fly out of Memphis?

Mr. MITCHELL. The notion that you can justify a merger based upon some future change in the marketplace, such as cabotage and open skies, is really not responsible. It is not going to happen in our lifetime. None of the 30 pilots or however many pilots are behind me want to wake up one morning working to find themselves working for the Spanish government. It is too complicated, and it certainly is no justification for a merger.

Mr. COHEN. Thank you, sir. I was in Raleigh-Durham recently, and I had a flight on US Airways. And I had some time, and so I was able to look at the scheduling chart and saw that American flew. And American had really much better prices and much better deals on your frequent flyers going to Washington from Raleigh-Durham. Is that one of the 12 routes that you are talking about, or is that one of the some 100 routes that Mr. Mitchell mentioned?

Mr. JOHNSON. That is one of the 12 routes.

Mr. COHEN. And what will happen there?

Mr. JOHNSON. I imagine that we will retain a high level of service between Raleigh-Durham and Washington, D.C.

Mr. COHEN. And will the price be US Airways prices or American Airlines prices?

Mr. JOHNSON. I do not know. We have not talked about that at all. You know, as I said, we announced this merger 12 days ago, and those are things that we will work on over the coming year as we——

Mr. COHEN. You know, it is not just Memphis. It was St. Louis with TWA, it was Cincinnati, it has been Pittsburgh, lots of hub cities who put a lot of investment in their airports. And it was a business that is important to their communities, suffered because of mergers.

Mr. Mitchell, do you see any of the hub cities that have served American or US Airways seeing a similar fate as Memphis, Pittsburgh, St. Louis, Cincinnati, and maybe others have because of mergers?

Mr. MITCHELL. Well, it is possible, and that is going to have to be a very fact-intensive analysis by DoJ. But certainly Philadelphia could be impacted, Charlotte could be impacted, Phoenix could be impacted because of the geography of adjacent hubs.

Mr. COHEN. Thank you, Mr. Bachus. I appreciate my time. Mr. Johnson, when you come to Memphis, let me know. We will get some ribs, and we will see Fred Smith. Thank you.

Mr. JOHNSON. I look forward to it.

Mr. BACHUS. Mr. Farenthold.

Mr. FARENTHOLD. Thank you very much. Mr. Chairman, when you started out, you mentioned some of the airlines had gone away. You skipped Braniff, a great Texas airline I grew up with. And I mention that because it really looks like the only thing consumers in the U.S. are looking on airlines right now is price.

You go back to the days when Braniff and Southwest were competing or Southwest and Muse Air, and you see some great competition on something other than price. And really all you have got now playing in that is Virgin is trying to offer a little bit different experience.

But to me, it really is becoming commoditized, and I am concerned as we get the number of carriers down, we drop—you said there are 12 direct flights. And you are saying there are only about 100 flights. Now, I am from Corpus Christie, Texas. To fly anywhere from Corpus Christie, you got to change planes in Dallas or Houston. I think there are a lot of folks who are in non-hub cities or not traveling to hub cities, they are in the same boat.

So, how many routes with one stop are you all competing on?

Mr. JOHNSON. I do not know the number, but what I can tell you is any route with one stop in which we are competing has very significant competition because everybody serves those routes on a one-stop basis. And those routes you have four or five——

Mr. FARENTHOLD. And I do agree, US Airways typically has, I see, as lower fares when I am booking. I do not have the luxury I used to have of being able to travel on Wednesdays, you know. I have got to fly on the busier days.

You were talking about no hub closures, and just looking at the map of the hubs, I am going to have to agree with Mr. Mitchell.

The geography just does not seem to make sense. And AA has a history of closing hubs. I mean, you had Nashville and Raleigh-Durham, but on the East Coast now, you have Miami, Charlotte, Washington, Philadelphia, and New York. That is a whole lot of hubs in a closed proximity.

How much assurance can you give us you are not going to shut one of those babies down?

Mr. KENNEDY. Congressman, a couple of considerations. If you look at the geographical distribution of the hubs, and you look also at the primary purpose of certain of those hubs, we have, as we have stated publicly, a high degree of confidence that the hubs that we have today will remain in place.

For example, New York, which is the largest market in the world, that serves primarily for American.

Mr. FARENTHOLD. I am not worried about New York or L.A.

Mr. KENNEDY. But just by way of example, that New York serves as an international gateway, Miami as a gateway going south. And then when you look at Charlotte, which is a north-south hub, and you look at Dallas, which is, you know, primarily Midwest and going east and west. When you look at those, we find them to be highly complementary of one another, and so I think it is unlike what you have seen in perhaps other merger situations.

Mr. FARENTHOLD. You guys are familiar that on some of the blogs and messages boards, like Flyer Talk, you are getting 70 percent opposition to this merger from frequent flyers.

It seems like you have got the public against you all on that. How are you all taking that?

Mr. JOHNSON. Congressman, I have not seen those numbers. The feedback that we are getting from our customers, we are getting from the communities we serve, is exactly the opposite. Everybody is very excited about it.

Mr. FARENTHOLD. All right. Let me get back to the price competition, and maybe, Mr. Mitchell, you can help me out a little bit on this. I know you expressed a great deal of concern about sites requiring a great deal of personal information from you to determine what fares you are going to get. And I think this is partially the airline industry's fault in that they have made this so difficult with all of the ancillary fees.

I get two free bags on United. My wife gets one free bag on United. I am a peasant on Delta, so I do not get any free bags. And Southwest gives everybody free bags. So, I mean, you have got to have some degree of information about the traveler.

Do you think there is a way we can create a system where anonymously or semi-anonymously you can actually compare what the bottom line price between two airlines is going to be?

Mr. MITCHELL. Well, first of all, with respect to fares, we have that system today. You can go to any online or brick and mortar travel agency and understand all the options in the marketplace. But when it comes to ancillary fees, like check bag, baggage, and seat assignments, and so on, it is an absolute mess.

For 5 years, the airlines' most important corporate customers have been demanding that these data on the checked bags be put into one place for comparison shopping.

Mr. FARENTHOLD. Let us get the airlines' response real quick, and I want to save about 15 seconds for me. Do you all have a solution to that?

Mr. KENNEDY. Well, let me just say a couple of things. First of all, American, US Air, we are strongly in favor of full transparency for consumers. That what we have been about.

Mr. FARENTHOLD. I am sorry, I am out of time. I do want to end this. I am concerned about this merger on a level as a frequent flyer. But we have given the opportunity to compete to all the other airlines. It seems to me with the merger that has gone through, it is only fair to offer you the opportunity, assuming you comply with the laws that are in place. But I remain concerned. It is very difficult for new players entering the competition. It is going to be a problem. And I will yield back.

Mr. BACHUS. Thank you, Mr. Farenthold. Those blogs, I think that 98 percent of the bloggers think that we are incompetent. [Laughter.]

Mr. FARENTHOLD. And you could do a scientific poll that we only get eight percent approval rating. [Laughter.]

Mr. BACHUS. Mr. Conyers.

Mr. CONYERS. Chairman Bachus, I want to ask a question you started off with. Is this merger really necessary? I think that there is a general thinking that there is support for it, but I wanted to ask, what if we really did not have this merger going on, Mr. Sagers? What do you think would happen?

Mr. SAGERS. Well, as I said, we are not going to see a liquidation of American Airlines I think in all likelihood. And I do not think we are going to see frequent liquidations of any carriers in the foreseeable future. We would preserve such competition as we have left for the near term.

And I think that we would see perhaps an additional degree of market discipline for cost containment that we have forfeited, you know, in our airlines competition policy.

Mr. CONYERS. Mr. Mitchell, if this hearing was not held and that we would continue with our business, what do you think would go on in the industry?

Mr. MITCHELL. If the merger were not to occur?

Mr. CONYERS. Yes.

Mr. MITCHELL. Well, I think, you know, we will several network carriers competing aggressively against one another. I think both carriers will do just fine.

Let us be honest. This is going to really help creditors. It is a better deal for labor. But it is all about the revenue, and if this merger were approved, we are going to three network carriers. The ability to coordinate fare hikes will be unprecedented. Last year there were 15 proposed fare hikes. Eight were rejected by one or two carriers.

The probability that they will be rejected in the future begins to go way down when you have three carriers and coordinated effects. We have to balance three network carriers, if it comes to it, with more transparency in order to preserve the marketplace and competition.

Mr. KENNEDY. Congressman Conyers——

Mr. BACHUS. I was going to suggest, Mr. Conyers, and we will give you an extra minute to let the two representatives of the airlines answer your question.

Mr. CONYERS. All right.

Mr. KENNEDY. Congressman, I have been in the airline business for 29 years. I joined American in 1984. And in all those years, this is the most competitive business I think on the planet. It is ultra-competitive. And what is going to happen when these airlines combine, that competition will remain.

We simply are trying to become a stronger, more vibrant competitor against those already in place. I think it is important for this industry. It is important when you look at the international alliances and the composition of both Star and the Sky Team Alliance.

And so this is going to give consumers more choices. It is going to allow us to better compete with the other airlines.

Mr. CONYERS. Well, there is nobody that does not think you are not coming out of bankruptcy.

Mr. JOHNSON. Congressman, if I might——

Mr. CONYERS. Yes, please.

Mr. JOHNSON. It is, in fact, the case, and I thank Mr. Mitchell for noticing how well US Airways has been doing recently. And it is, in fact, the case that American has had a terrific restructuring and could easily emerge on a stand-alone basis.

That is not really the question. The question is, why are we doing this and for whose benefit? Our customers have been telling us that they want a bigger network. They want a network competitive with United and Delta. They want more choices and more opportunities. They have been telling us that directly. And discouragingly for Mr. Kennedy and I, they have been telling us indirectly by leaving American Airlines and leaving US Airways to fly on Delta and United's new bigger networks. So we help our customers by this merger.

Second, we help our employees. US Airways is a smaller airline. Has a smaller network and a revenue generating disadvantage versus the other big airlines. As a result of that, to be successful we have to pay our employees less, and we have made a bargain with our employees over time that we can give them good jobs and good benefits, but they are going to be less than those enjoyed by their counterparts at Delta and United. By merging and creating a network like Delta's and United's, we can pay our employees more, and we have an agreed path to pay them the same as Delta and United.

In addition, when we talk to people in our principle cities, in these hubs that we have talked about so many times today, they do not talk to us about price issues or price concerns. They talk to us about finding ways for there to be more service, finding ways to grow the hub, finding ways to create more destinations for travel. All of that can be accomplished by this merger, Congressman. And that is what we are trying to do today.

Mr. CONYERS. Well, you are both doing okay now. You know, what I hear you saying is that it may get tougher later, and we want to be prepared, and so we are going to merge now. And I am not sure if that goes along with the American Antitrust Institute.

Do either of you know what the economic scholars are thinking in terms of this kind of discussion, Mr. Sagers?

Mr. SAGERS. Yeah. I mean, you know, there are a lot of econometric study of airline fare changes. And it is in some dispute, but there is substantial evidence that on specific city pairs, prices go up when concentration goes up. And we hear a lot, by the way, about average prices going down, and that is very misleading.

Mr. BACHUS. Mr. Johnson, you respond, and then we will——

Mr. JOHNSON. Sure. I mean, first, I will respond, but I want to make sure that we give Dr. Winston an opportunity to respond because he is the expert on airline pricing here today.

What I can tell you is that after this merger, this is going to be a very, very competitive industry. There will be four airlines with each having less than 25 percent market share and each with nationwide networks that are very competitive.

There will be two airlines, Alaska and Jet Blue, that provide significant competition in regions—Alaska in the west, Jet Blue in the east.

Mr. CONYERS. It will be more competitive after this merger.

Mr. JOHNSON. I expect so.

Mr. CONYERS. And what would it be if there were not a merger?

Mr. JOHNSON. In fact, the industry is very competitive now, Congressman, and it is going to be very competitive after this merger. After this merger, we will have Southwest continuing as a low cost, Jet Blue continuing as a carrier with a significant cost advantage. But three very fast-growing low-cost airlines, Spirit, Allegiant, Virgin America, all providing competition regionally and, as they grow, extra regionally.

Mr. BACHUS. Thank you. And I think that is what Mr. Winston's and others' testimony said.

Mr. Holding?

Mr. HOLDING. Thank you. I will preface my remarks by saying that I am a very happy frequent flyer of American Airlines. It serves the routes that I travel in best.

I know an airline that was omitted in our discussions, Piedmont Airlines, which is a very fine North Carolina based airline. It was Airline of the Year in 1984. And I spent many an enjoyable mile flown on Piedmont Airlines.

I fly out of Raleigh-Durham International, and it is a very important airline to my constituents. It is an economic booster for the Research Triangle Park that is very important to our businesses there.

It is even finer than the Memphis Airport, I might add, the brand new, newly-built.

How much is the overlap between American and US Air in the Raleigh-Durham market, Mr. Kennedy?

Mr. JOHNSON. The overlap, I think, is just on the Washington, D.C. flight. American serves its hubs from Raleigh-Durham. We serve our hubs from Raleigh-Durham. And so I think the overlap is just limited to that one flight.

Mr. HOLDING. Right. And I noticed that the prices on American and US Air are virtually the same flying out of Raleigh-Durham to D.C. How much overlap do you have in Charlotte?

Mr. JOHNSON. Virtually zero. American serves Charlotte to its hubs, and we have a very large connecting hub in Charlotte.

Mr. HOLDING. Right. And I believe US Air serves D.C. out of Charlotte. I think they are probably the carrier that has the most flights out of Charlotte to D.C. What would you anticipate that the price difference is between Raleigh to D.C. and Charlotte to D.C. is?

Mr. JOHNSON. I do not, but it sounds like you might know. [Laughter.]

Mr. HOLDING. It costs a lot more money to fly from Charlotte to Washington than it does from Raleigh to Washington. And that is concerning. It is very concerning. Your direct competitors have a route from Raleigh to Washington, whereas US Air does not have a direct competitor in Charlotte, so it costs a lot more money. And that would certainly impact the folks who live in my congressional district.

Do you anticipate that the fares would go up significantly in the future in Raleigh to Washington when you are no longer competing with one another?

Mr. JOHNSON. Congressman, as we have said before, I mean, any discussion about fares or that sort of planning and strategy is something that is down the road for us. And, you know, those are issues that we will be discussing really with respect to fares and things like that, probably not until after the merger.

Mr. HOLDING. So what are the top three factors that you would have under consideration when you are making your pricing decisions down the future, whether it is in this route or another route?

Mr. JOHNSON. The top three factors: demand, the cost of providing the service, the opportunities to provide service over a hug. In other words, if we can attract passengers to go more places than the original destination, the hub, it gives us an opportunity to operate more efficiently and provide a more cost-effective service.

Mr. HOLDING. And the factor of whether or not you have a direct competitor in that market is not in the top three factors?

Mr. JOHNSON. The airline industry is a very competitive business, and we compete, and we compete in virtually every market that we operate.

Mr. HOLDING. American Airlines operates a direct flight out of Raleigh-Durham to London Heathrow. It seems to be a popular flight. Do you know if that is a profitable flight or an unprofitable flight?

Mr. KENNEDY. Congressman, I am not aware of whether it is or is not profitable, but it is a service we have had for a number of years. And as you know, with the combination we had British Airways in terms of our joint alliance, we offer a tremendous variety of service into Heathrow and elsewhere. And I would hope that that service you are referencing continues, but I just do not know about its profitability.

Mr. HOLDING. Is there any consideration of expanding the international flights out of Raleigh-Durham Airport that you know of?

Mr. KENNEDY. You know, one of the things about the industry is that we are always looking at where it is that we can expand our service. As I had mentioned, you know, we have an aircraft for 500 new aircraft that we just did the summer before last. And that

is going to allow us to not only replacing aging aircraft, but also to expand our service.

So our route network people at the company spend a tremendous amount of time looking at opportunities as to whether or not we can increase service, I do not know. I am going to have to ask our folks to look into this particular question and get back to you. But if the demand is there, then we would like to increase the service and provided, of course, that we can get, you know, landing rights on the other side of the equation.

Mr. HOLDING. Thank you, and I would appreciate that follow-up, not only on the international routes, but on the question of competition and how that will be in your analysis as far as the Raleigh-Durham Airport is considered. Thank you, Mr. Chairman.

Mr. BACHUS. Thank you, Mr. Holding.

Mr. Johnson?

Mr. JOHNSON OF GEORGIA. Thank you, Mr. Chairman. Thank you for holding this hearing. And when I heard that my esteemed colleague, Steve Cohen, had said some things about the Memphis Airport and kind of compared it to the Atlanta Hartsfield-Jackson Airport, I had to make sure that I came. [Laughter.]

Mr. COHEN. I am sure it hurts.

Mr. JOHNSON OF GEORGIA. And I tell you, this is not to take anything away from the Memphis Airport, and Memphis may, in fact, have the best ribs and that kind of thing. But you will never have an experience like you will when you go through Atlanta's Hartsfield-Jackson Airport.

Mr. COHEN. That is true. [Laughter.]

Mr. JOHNSON OF GEORGIA. I mean, the hospitality, the real southern hospitality, the ambiance, the warmth of the people there, and the food. I mean, everybody knows about Pascal's Fried Chicken that you can get out there at the airport. Everybody knows about the good peaches that come out of Georgia, and they go into that peach cobbler that just melts right in your mouth. You know, peanuts, pecans, Coca Cola. I mean, it cannot compare. It is incomparable.

And so let us make sure that we clear the air on that issue. I do love barbecue every once in a while, but I can eat some fried chicken every day. [Laughter.]

Now, Mr. Steven Johnson, thank you for testifying. Thank you all for testifying today on this issue.

I am interested in the effects of this merger on union and nonunion employees. You have indicated in your submitted testimony that the combination of these airlines will generate substantial net synergies, and establish the financial foundation for a more stable company, and better opportunities for our 100,000 employees. However, current and former employees may also be concerned about how the merger will affect benefits, such as their health care benefits and pensions.

Mr. Johnson, how does the merger affect the benefits of current and former employees?

Mr. JOHNSON. Well, Congressman, first I want to comment that the statement that you made about Atlanta I think has a lot to do with why most people consider Delta the most profitable and successful airline in the United States today. And that is one of the

reasons why we need to create this new network to compete with things like that. So thank you very much for that.

Mr. JOHNSON OF GEORGIA. Thank you.

Mr. JOHNSON. But could I ask Mr. Kennedy to answer this question? He is very deeply involved in the negotiations about that and more familiar with it.

Mr. JOHNSON OF GEORGIA. Sure. Mr. Kennedy?

Mr. KENNEDY. That was very well done, Mr. Johnson. Well, first of all, with regard to current and former employees, as to retirees, we are still working through our bankruptcy and determining what will happen with retiree benefits.

I will say that as we have with current employees where we have changed the medical insurance benefits upon retirement, we are seeking to do the same with regard to retiree employees. With regard to pensions, as you know, we were successful in freezing our pension plans rather than terminating them, and that is terrific for all employees because we will pay all the benefits under our pension plans to our employees. We are not sending those obligations to the PBGC for payment. I know that has been done in the past, but we worked hard to go ahead and freeze those plans rather than terminate, and that is a success coming out of this bankruptcy.

Mr. JOHNSON OF GEORGIA. Thank you. Do you see any changes to the basic benefits occurring in years to come?

Mr. KENNEDY. I do not know what will happen in future years, but I will tell you that particularly with both our union employees and our non-union employees, when we structured our new contracts with our organized labor groups, we did so in a way that would provide to the company productivity improvements, but would also provide for pay increases for our employees. And we now have new 6-year contracts.

Now, we do have work to do with this merger in terms of getting, you know, one contract among all the labor groups, but we have made substantial progress in getting that finished and ready to go. So I believe that while some of the changes we made with regard to productivity improvements are difficult, that employees will benefit not only from the pay increases we have in place, but as we grow the airline in the future.

Mr. JOHNSON OF GEORGIA. Thank you, Mr. Kennedy. I yield back.

Mr. BACHUS. Thank you.

Mr. Rothfus.

Mr. ROTHFUS. Thank you, Mr. Chairman, and thank you, panel, for being here today. It has been a great discussion.

I live about five miles from the Greater Pittsburgh Airport. When Pittsburgh lost its hub status about 10 years ago, we dropped from over 500 flights to fewer than 50, and we lost thousands of jobs in the process, and a world class airport remains under-utilized. It has created an inconvenience for the traveling public and also for our business community to have not as many flights as we used to.

Currently we have about 41 US Air flights and 15 American Airlines flights out of Greater Pitt. Can either Mr. Kennedy or Johnson give us any kind of assurance that the number of flights will not be reduced out of Greater Pitt?

Mr. JOHNSON. Congressman, those are flights that we operate to our respective hubs. They work really well for both of us. I would anticipate that the merger is not going to change air service to Pittsburgh materially in any way.

I will say that the people of Pittsburgh will have some advantages associated with those flights being combined on one carrier. They will be able to fly online to more places. They will be able to accumulate their frequent flyer miles on one airline instead of two. Travel will be more convenient. But I do not anticipate that it will change the air service to Pittsburgh at all.

Mr. ROTHFUS. Has there been discussion about post-merger, changing hubs at all, moving hubs, consolidating hubs?

Mr. JOHNSON. I think just the opposite. We anticipate that we are very happy with the hubs that we have. As Mr. Kennedy said, they are geographically diverse. They are functionally diverse. They all work for the separate airlines, so we anticipate they will be very successful after the merger. We do not anticipate adding any hubs.

Mr. ROTHFUS. Well, I would like to talk a little bit about some of the hubs you have, particularly those in the New York area, you know, JFK, La Guardia, and then down to Philadelphia. You always hear about constant overcrowding, delays. Leisure and Travel magazine, for example, asked travelers to rank the worst airports in the country, and the top three are La Guardia, Philadelphia, and JFK. And here we have not only an under-utilized airport out in western Pennsylvania that I think could serve as a hub, and I would just ask the parties to consider that as you do your planning.

Moreover, you know, we have a recent drilling arrangement out there at Greater Pittsburgh Airport that is going to be a benefit, or may be a benefit, to airlines to consider that. So again, I would ask you to consider that.

Both of you testified a little bit about some of the small and middle-sized communities, and I have some of those in my district. And I'm just wondering if you either of you might opine on expansion to some of the underserved communities that might result from this merger.

Mr. JOHNSON. If I could, Congressman, again we have not done any of that planning yet, and we will not be able to do any of that planning until we close the merger. But one of the great opportunities of this merger is the complementary nature of the networks. I had mentioned in my opening remarks that there are some 130 cities that American Airlines serves that US Airways does not serve, 62 cities that US Airways serves that American Airlines does not serve.

When we make decisions about serving any market, particularly small- and medium-sized markets, there is an economic calculus that we undertake, and that economic calculus involves determining what the revenue potential is and then subtracting, if you will, the projected costs. And when we at US Airways look at new service, one of the big costs are developing infrastructure, recruiting and training employees, and creating a marketing presence in a community.

In Pennsylvania where there are a number of communities that US Airways serves and American Airlines does not serve, that infrastructure exists. We have really quality employees there al-

ready, and there is a great marketing presence as you know. Those are great opportunities for expanding service from the American Airlines hub.

Mr. ROTHFUS. We would be looking for, you know, opportunities to expand even additional communities, such as Johnstown, Pennsylvania.

You know, related facilities that US Air currently has in Pittsburgh include an operations center that employs about 1,800 people. Now, old American or American has an operations center in Dallas. What is the consideration for the operation centers for the respective airlines, and what can we expect to happen to the operation center at Greater Pitt?

Mr. JOHNSON. Well, that is something we would have to discuss. We obviously will operate separate airlines until we close the merger, but then we will continue to operate separate airlines for, I would think, 15 to 18 months. That will continue to require two operation centers.

During that period of time we will talk and plan and see what works in terms of ultimately combining those operation centers or, you know, finding an alternative way to manage that.

Mr. ROTHFUS. I guess you are considering then a consolidation of the two at some point in the future?

Mr. JOHNSON. I think in general airlines, you know, operate from a central operating system—sorry, central operating center. And I would expect that at some point in time, once we have completely merged the airlines and their operations that we would as well.

Mr. ROTHFUS. We also have a maintenance center at Greater Pitt. Any consideration on that with US Air?

Mr. JOHNSON. We have about 1,000 maintenance employees engaged in heavy maintenance in Pittsburgh. It is a very senior workforce, so it is reducing a little because of retirements of our great employees, so we expect that to be about 975 employees at the end of the year. But it is a central part of our maintenance operation. We expect it to be not affected in any significant way by the merger, but as we plan and we look out into the future, it is a little hard to say at this point.

Mr. ROTHFUS. Again, I would ask you to consider taking a look at Greater Pitt in any post-merger——

Mr. JOHNSON. Obviously we are very close with your colleagues in the delegation and the governor, and even our friends in Philadelphia have asked that we do that. And I promise in the next couple of weeks to go to Pittsburgh myself and talk to the city and civil leaders there about these issues.

Mr. ROTHFUS. Thank you. A question for Dr. Winston, a fascinating——

Mr. BACHUS. Well, actually——

Mr. ROTHFUS. Thank you. Thank you, Mr. Chairman.

Mr. BACHUS. Thank you.

Ms. Delbene.

Ms. DELBENE. Thank you, Mr. Chairman.

Mr. Johnson, you brought up earlier the demand from your customers to have a larger network so that you would be able to serve more of their needs and to be more competitive with some of the larger carriers. Where do you see the balance between having that

larger network internally versus having partnerships to meet those demands?

Mr. JOHNSON. Well, I think we would always prefer to do it internally if we could. Partnerships serve a purpose that accomplishes something like a network, but an imperfect replication of a network. And you usually undertake that when there is some reason that you cannot create the network you want. Usually national ownership rules of airlines and things like that, bilateral agreements between countries for international flying. Those are the kinds of things that lead to partnerships and business arrangements because you cannot under the law achieve the network you want.

Ms. DELBENE. And when you look, and Mr. Kennedy as well, when you look at after the merger, do you intend to maintain the partnerships that you have today? And I guess I will preface that with I am from the other side of the country, from Washington State. And Alaska, for example, is a big carrier in our neck of the woods, and so the partnerships are very important.

Mr. KENNEDY. Alaskan Air has been a very important partner of ours, and so while, again, as Mr. Johnson said, we have not made any determinations of what the network will look afterwards. But that partnership has been very important to us, and it is a great airline. And so, you know, I would hope that that partnership would continue.

Ms. DELBENE. And I think Mr. Mitchell brought up the NDC earlier, and I wanted to give a chance to either you, Mr. Johnson, or you, Mr. Kennedy, to give your viewpoint price transparency, and NDC, and you feel that would be impacted after the merger, or just your view on NDC in general.

Mr. KENNEDY. Well, two things. One is, and perhaps I had said earlier this earlier, and I apologize if I did. But we are strongly in favor of price transparency to consumers. It is very important and always has been and needs to continue. I think where we disagree is talking about whether or not there ought to be a regulation or legislation that mandates how you need to provide that information. We do not think that is appropriate. We think particularly with the advent of technological changes that there are different ways to get information to consumers than what might be suggested otherwise.

I am not particularly familiar with the IATA proposed regulation or measure that is referenced here. We will be happy to look at it and provide additional information, but I am just not familiar with it.

Ms. DELBENE. Okay. And your concerns, Mr. Mitchell, about NDC are not necessarily specific to the merger. You have concerns generally, is that correct?

Mr. MITCHELL. They are specific to the merger because the merger will allow an acceleration of this NDC in the marketplace. US Airways has long been a maverick in distribution issues. For example, in 2001 and '02 when the airlines withheld web fares from travel agencies and corporate travel departments, they only provided them to orbits. US Airways broke rank and began to provide the fares to the marketplace, likewise in 2006.

So the big American swallowing up the maverick US Airways is only going to allow this to go forward more quickly. And once embedded in the largest marketplace in the world, it is going to cascade across all the other markets.

The problem is no publicly available fares and schedules will be available anymore. It kills transparency. I will get a deal that is crafted just for me, and I will have nowhere to go to compare it publicly to see if I really got a deal at all.

Ms. DELBENE. And, Dr. Winston, since you are the pricing expert—I think someone said earlier—what do you think in terms of prices, and competitiveness, and the ability for consumers to have transparency? What do you think the impact of the merger or NDC has on that?

Mr. WINSTON. Well, keep in mind, there is something very special about this industry. A small percent of the people do a huge amount of the flying. You know, something on the order of five or six percent of the travelers do like 40 percent of the flying.

It is absolutely ludicrous to think that an airline will think, hey, a really good strategy for us to not have transparent prices for people who fly all the time who probably have these things memorized, and all of a sudden one day they do not what they are. I mean, talk about a way of alienating customers. I mean, I can imagine many strategies that are concocted all the time. I do not know where they come from, but this is just not how you make money in regular real businesses.

So I am certainly supportive of concerns about transparency, but I think, you know, the nature of travel is that this would just be crazy to do, and almost an embarrassment really for anybody. If an airline proposed to do this, I would hope they would feel embarrassed for doing it.

Ms. DELBENE. Thank you. Thank you, Mr. Chair.

Mr. BACHUS. Thank you.

Mr. Marino.

Mr. MARINO. Thank you, Chairman. Good afternoon, gentleman.

Let me begin by saying I support the merger because the employees want it and because of the gentlemen sitting behind you in uniform took the time to be here. So I thank you for doing that as well.

I do have some concerns, and my previous life was a prosecutor. So I ask short questions. I expect a yes or no answer. And if you have to follow it up, make it very brief.

What is going to happen to consumer rates? What is going to happen to consumer rates? Are they going to go up?

Mr. JOHNSON. No.

Mr. MARINO. Are they going to go down?

Mr. JOHNSON. I do not know. As we have said, Dr. Winston is the man who can best describe that. But the studies show that notwithstanding the earlier mergers that we have talked about today, there have not been price increases of the sort that Mr. Mitchell and Professor Sagers suggest might happen here. So I do not expect prices to go up across the board.

Mr. MARINO. All right. I did some private practice in my time and did mergers and acquisitions. And whatever we call them, mergers, acquisitions, takeovers, you know, that is not important

to me at this point. And in my experience I am told that they will reduce costs, and then several months later when I asked where the prices are, they said the prices do not go down, but the answer is, well, we kept them the same and prevented them from going up. And then several months later, the prices went up.

So what is going to happen in the first 6 months, in the first year, in the first 3 years about pricing?

Mr. KENNEDY. Let me just say a couple of things. One is, we do not know what will happen. You know, the airline industry is, as I have mentioned, a highly competitive business with very thin margins. And that is going to exist after the merger as it is today. And that has an effect on pricing and what those levels are. And so I do not know what will happen. Pricing will simply be competing on price and schedule in the future as we do today.

Mr. MARINO. Thank you.

Mr. JOHNSON. Congressman, I could just add that it will be a very competitive business, in many ways more competitive as we create an alternative for consumers to the very large networks of Delta and United. There will be four big airlines, each with less than 25 percent market share, each with a national network to serve customers, all competing with each other. Two airlines that have very vigorous competitors on a regional basis, Alaska Airlines and Jet Blue, and three fast-growing low-cost carriers that compete with us at various points around the United States. It is a very competitive industry, and that competition is not going to decrease as a result of the merger.

Mr. MARINO. I think I know what the answer to this is going to be, but with all due respect I have to ask it. I am assuming that there has been no backroom deals that someone in the near future is going to get whacked whether it is the employees, or the pension, or the pilots?

Mr. JOHNSON. There have been none.

Mr. KENNEDY. That is correct.

Mr. MARINO. All right. I live in the 10th congressional district of Pennsylvania, northeast, north-central Pennsylvania. How am I doing on time, sir?

VOICE. Fine.

Mr. MARINO. Small airport Montoursville. I have to drive to Montoursville to get to that. But then to get to D.C., I have to take a plane from Williamsport, to Philadelphia, to D.C. It takes over 6 hours when it is on time. I drive because it is 4, 4 and a half hours and it is less expensive.

Is anything going to improve for the smaller areas in which I live where my county, Lycoming County, is about 130,000 people, but people have to travel into that county from surrounding counties to catch a plane?

Mr. JOHNSON. Well, I cannot speak to your specific——

Mr. MARINO. Could you put it in writing for me and get it to me at some point?

Mr. JOHNSON. I would be happy to.

Mr. MARINO. Okay. And my favorite pet peeve, and I am going to raise this. We all fly, but there are certain reasons why we have to change a flight. And no more who it is, what airlines. If I am changing a flight 4 or 5 days in advance or find out at the last

minute that something has happened that I want to change that flight, the price goes up substantially. By the same token, when I call, just happen to be 6 days ahead of time instead of 7 days ahead of time, the price doubles, even though there are empty seats.

Can you explain to me why? And I know one of the answers is going to say, well, you do not want to wait until the last moment, but you have got to come up with a better answer than that, please.

Mr. JOHNSON. I understand that sometimes consumers find that frustrating, but we offer a variety of products. We will sell you a ticket that is fully refundable, and we sell you tickets that are non-refundable. And in general, if we sell a ticket that is not refundable and then someone has to change it or seek a refund, what we do is we charge them what they would have paid for a non-refundable ticket in general—or, sorry, for a fully-refundable ticket in general. That is how that works.

Mr. MARINO. Does anyone wish to respond to any of my questions? I know I focused on that, but quickly, please. I think I am running out of time or have run out of time.

Mr. BACHUS. Yes, you have.

Mr. MARINO. I have run out of time? Would you like to put it in writing and get it to me, gentlemen, please? Thank you.

Mr. BACHUS. Thank you.

Mr. Garcia.

Mr. GARCIA. Thank you, Mr. Chairman. I want to turn your attention from the delights of Memphis or the incredible southern hospitality to the most southern airport in our country, which is the Miami International Airport.

As you and Mr. Kennedy know, we have a huge dead service at that airport, and part of it was making sure we had one of the best terminals for American Airlines. Do you feel that we are going to cut any flights there? Are we going to increase traffic there and thereby help out our airport?

Mr. KENNEDY. I do not know specifically what we will do in the future at Miami, but——

Mr. GARCIA. Mr. Kennedy, I need you to be a little more specific because this not Memphis, and this is not a small regional airport. This is the crown jewel, to some degree, of international flying into Latin America, which I assume was one of the reasons that this becomes an interesting target. So I want a specific answer because in my community we are leveraged, as you well know, to the hilt because of this airport. And I am committed to this process going forward, but I want to understand what impact it is going to have on my community.

Mr. KENNEDY. Congressman, I am to be specific as I can.

Mr. GARCIA. Okay.

Mr. KENNEDY. American Airlines is committed to Miami, and we have been for many, many years. It is, as you know, a tremendous gateway. Not only is it a terrific O&D traffic right in Miami, but also going south into Latin America. And it is something that is a prized part of our operation.

And so while I cannot specifically say what will happen in the future, I can tell you that if you look at the history of the last 5, even 10 years, we have grown our operation significantly, and we

were a major proponent of the development of that airport. And I specifically in my previous job at American ran our real estate and construction business, so I know exactly what you are talking about in the terms of the debt load at Miami. But I also understand that that airport now is a first class airport. The new train, the new terminals, are absolutely fantastic. And we remain enormously committed——

Mr. GARCIA. It does not smell like ribs, though, unless the Memphis Airport. [Laughter.]

Mr. KENNEDY. No, sir, but it is a terrific airport, and everything we do in Miami is wonderful.

Mr. GARCIA. We had Secretary Napolitano down last week, and I appreciated the American Airlines representative there to help us. Clearly they are the biggest carrier at the airport; therefore, it is important their participation.

One of the problems as you well know is that we have a huge number of passengers have missed connecting flights. Obviously we are very worried about the sequestration, the impact that is going to have. Almost 40 plus thousand people miss connecting flights on a monthly basis because the border and customs agents, we just do not have enough of them. As you well know, we built one of the largest reception centers in the country. We cannot fully staff it during peak times because there are not enough workers.

So one of the things that we propose with the Secretary, and she seemed very willing to listen to, is the ability of us picking up some of the costs of providing government workers. So possible overtimes, training people, even paying for having, what do you call it, a global pass entry system. Is this something that the combined airlines could look at doing simply to increase your efficiency and help us with that cost as we go forward?

Mr. KENNEDY. Throughput at the airport is very important, and those lost connections just end up costing not only the customer, but cost us, so we are with you there. I think we have to balance whatever those costs might be to pay a portion of those costs against the lost revenue, if you will, and the inefficiency of having those lost connections. And we will be more than happy to work with you to see if that is something we should do.

Mr. GARCIA. If you could get back to me on that because it is certainly something that I know it would probably be a lot cheaper to pay a little bit of overtime and not have, you know, 100 passengers or 50 passengers miss a flight every few hours because of—I am sure my colleagues on the other side would call it government inefficiency. I just call it maximum capacity. And so we have got to make it more efficient to do this.

But having you help us with that I think is key to continuing our growth. I think we had a growth of 17 percent last year, so we are very proud of that, and we are proud we do not smell like ribs either. So it is Cuban coffee, Versailles Cuban coffee that wafts around in our airport.

Just one final question. In terms of as you look at size, right, clearly you want to be more competitive. Clearly you want to offer more. Our airport is one of those throughput places. Do you think we are going to get more folks in South Florida working for you,

or do you think we are going to reduce the workforce, because we have been increasing, right? And so I just want to——

Mr. JOHNSON. I can say just to echo Mr. Kennedy's comments that people at US Airways are very excited about Miami and very excited about adding back to the US Airways network in effect. In fact, there are some 35 cities just on the east coast alone that US Airways has service that are not served from Miami. All of those are opportunities to look at.

Mr. GARCIA. It is almost like living in the United States it is so nice there.

Mr. JOHNSON. I spend a lot of time in Miami, so I agree that it is a great place.

So, you know, I think you should be optimistic about Miami's future. It is a critical part of the operation. Latin America and South America in particular is going to be one of the fastest-growing parts of the global economy. And the New American Airlines is very well placed to take advantage of that, and there is no better place than Miami as a jumping off point for that. So I would be optimistic about the future.

Mr. GARCIA. All right. Thank you very much. Thank you, Mr. Chairman.

Mr. BACHUS. Thank you.

Mr. Jeffries.

Mr. JEFFRIES. Thank you, Mr. Chairman.

The American airline industry is certainly extremely critical to our economy, to our commerce, to ability to keep families together, our social network, educational infrastructure. By any measure, the airline industry is critical, an important part of who we are. And I think all of us, and certainly the American public, want to see the industry succeed, be successful, be able to offer competitive rates and transport people to their desired destinations.

But the experience that I think the industry has had over the last 35 years paints a very different story or very troubling story just when you consider the raw numbers. I gather there have been 160 bankruptcies since 1978. US Air has experienced two in the last decade. American Airlines is coming out of bankruptcy.

Part of the response seems to have been the mergers. We are now looking at our 3rd significant merger in the last 5 years. I think there is bankruptcy fatigue, and we may be soon experiencing merger fatigue.

But I would be interested in getting either of the two airline representatives' perspectives on why over the last 35 years has the industry struggled to such a degree. And what confidence can you convey to us that this merger is part of the solution as opposed to simply another band aid on what has been a persistent wound that we have seen over the last 35 years?

Mr. KENNEDY. You are correct in your assessment of the industry. It is one that has been fraught with difficulties. It is a volatile industry. It is one, however, that is also, as you point out, so vitally important.

And, you know, there are a number of measures that affect the industry, whether it is high fuel prices, whether it is problems overseas with different stability of governments, even problems, sort of affect our industry and the demand for air travel.

And so that is not going to go away. But what it does mean I think for not only our companies but also for this country is we need to have a strong airline industry, not only to be able to service our own country, but also compete against the other major international airlines.

And so to answer your question, I believe that this merger, while not solving those external factors that so much affect our industry, but having a healthy carrier and a healthy industry, this will help us be stronger, and be able to compete, and be able to withstand some of those external shocks that affect us that are outside of our control.

Mr. JOHNSON. I mean, it really has been a very fascinating 35 years, and particularly the last 10 have been very difficult as we have, you know, lurched from crisis to crisis. But the airline industry is, I think, finally becoming more stable, and as Mr. Kennedy points out, that is a really good thing.

We have finally gotten ourselves, I think, to a point where we have the ability to, you know, to earn a fair return on our investment, invest in new routes and improve service, to provide good pay and job security for our employees. I mean, over the course of the last decade, I think we destroyed 160,000 jobs or something like that in our industry.

And during that decade, we closed something like a dozen hubs. I think they have all been mentioned here today. But we have finally gotten ourselves to a point where we can continue to pay—oh, I am sorry—where we can pay our employees, create good job security, create advancement opportunities for them, allow them to be more comfortable having a career in the airline industry.

And we have gotten ourselves to the point as an industry where we can make commitments to hubs like we have made today and feel comfortable that we are going to be able to provide that service and continue to grow it. Bu most importantly, what this has allowed the airlines to do is become more competitive, be more stable and, therefore, to be more competitive, to provide more choice to customers, provide more products to customers, to provide more innovation to customers both in the United States and around the world.

Mr. JEFFRIES. Everyone has mentioned these external shocks to the system, whether that is fluctuating oil prices and war, terrorist attacks. I think even sequestration was mentioned by Dr. Winston.

You said what was important for the industry is to have the capability to match capacity with demand. And you indicated that in your view, mergers would better enable these two companies, and I gather, anyone in the industry to do that in a more effective and efficient way.

Your theory seems to be based on the notion that the bigger the company the better it is able to deal with matching capacity with demand. Now, that seems to be a too big to fail theory, and we have had some experience in that regard in other areas. But I want to give you an opportunity, one, to indicate why you think mergers will put these companies in a better position, and also if you could reference some of the other tools that are available that you indicated in your testimony, to enable companies, perhaps aside from a merger, to match capacity and demand.

Mr. WINSTON. Are you asking me? All right. The key thing in matching capacity with demand is an optimal network, all right? Now, what you have to understand is that for 40 years, airlines did not have an optimal network. Matter of fact, they had a sub-optimal network; that is, they were regulated from 1938 to '78, okay? And they were not allowed to enter new routes if they wanted to. It was difficult even to exit routes.

So they started off way behind in a very bad network, all right? So it is not an accident that Southwest has had advantages because they were not a legacy carrier. They were intrastate and were able to develop their network from scratch, so to speak, or, you know, in a better position under deregulation, the other carriers, all right?

So really what we are observing, believe it or not, is still the development of an optimal network, okay, subject to a lot of shocks. It does not necessarily mean that bigger is better, but given where you were often is to the extent that you can balance traffic in particular areas, coordinate the traffic better, and move your fleet around as appropriate in response to changes in macro-economic conditions.

Now, of course, the best tool is also going to be pricing, right? You want to fill up your plane, you lower your prices. You obviously have high demand, you are not going to have to do that.

So in combination with pricing, improved service, all things that will help generate demand at the same time that you have the freedom and flexibility to have a network with a fleet that is aligned with that network, that gets you optimization in terms of your operations and what your carrier is capable of doing.

To the extent that the merger is a tool in creating that optimal network—that is, you have some of your network developed, but it would be a lot better if you could have another part of it included with your network, balancing traffic flows, coordinating operations, so on and so forth, that is where the mergers can help. But let me stress that this is something that takes a long time to achieve properly. The carriers just do not come together and that is it. They start then pruning the network.

Now, if you want to see a very clear example of this, look at the railroad industry. That whole industry has completely transformed to be state-of-the-art of the world where it was close to liquidation because it was deregulated and did a lot of restructuring through mergers. And that is an extreme case, but in its own way, the airlines are trying to do a similar thing. And mergers are a tool. Not the only tool. They do not always work brilliantly, but that is really what they are about.

Mr. JEFFRIES. Thank you.

Mr. BACHUS. Thank you. We are going to go in a second round of just Mr. Cohen and I, so we have got about 10 minutes left. But anybody in the audience who needs to take a break now, you can go ahead.

Mr. Winston, you are absolutely right. The regulations almost put the railroads out of business, and deregulation saved them. And we are seeing continuous innovation in the rail industry. And it was capital starved and was not able to generate enough profit

to maintain its infrastructure. And so that brings me really to my first question to Mr. Johnson or Mr. Kennedy.

You are going to realize changes in efficiency in operating structure of how many, a billion and a half? A billion, billion and a half, is that what the number——

Mr. JOHNSON. We have announced net synergies of more than a billion dollars. Those synergies on a gross basis, if you will, are larger than that, but the creation of approximately $1.5 billion of synergies or $1.4 billion of synergies has allowed us to make the arrangements with our employees that we have talked about here today. We have invested about $450 million a year in our employee wages, and benefits, and retirement.

Mr. BACHUS. So of that $1.5 billion, almost $500 million will be in improved compensation for employees?

Mr. JOHNSON. Four hundred fifty.

Mr. BACHUS. Somewhere in that neighborhood. And how will that other billion, how will it be used, and how will that benefit the traveling public?

Mr. JOHNSON. I think in many ways. First, it will create a more financially sound and stable company. We talked in response to Congressman Jeffries' questions about the shocks and the difficulties that the airline industry faced over the last decade. First and foremost, we will be able to better withstand shocks and better able to deal with the uncertainties and the cyclicality of the airline industry.

The second thing is it will allow us to invest in our airline. We have already talked about the investment that we are making in our employees and their well-being. But as Mr. Kennedy can talk about in more detail, it allows us to buy new airplanes, to provide new products to customers, and importantly, to have the financial wherewithal to experiment and try different models and add destinations to our system, knowing that if they do not work, we have the financial wherewithal to deal with that.

So it allows us to take more risk and through that, provide benefits to our customers.

Mr. BACHUS. Now, I have noticed that the airlines that generate enough profits to buy new airplanes, more fuel-efficient airplanes, more modern airplanes, do tend to either capture market share or they have to, if you have to compete with, you are at a disadvantage. So I would think that you would modernize your fleet, as you say, is a part of the plan?

Mr. JOHNSON. At US Airways we have been modernizing our fleet for the last 6 or 7 years, and that is certainly the experience we have had, Mr. Chairman.

Mr. KENNEDY. I would just add that customers really are asking for, demanding a new modern fleet not only for the comfort, but for the products and services that we offer. And that is all very capital intensive and inordinately expensive. And so we need those funds to be able to continue to invest in this business along the way.

Mr. BACHUS. And American has not been able to make those investments. At least it has become more difficult.

Mr. KENNEDY. Indeed the last 10 years have been very difficult for us, and we have really struggled financially. We finally made the announcement of the aircraft orders a year and a half ago, and

that is what is necessary because we had quite an aging fleet at American and not a fuel efficient fleet. And given the price of oil, that is going to help substantially as well. But nevertheless, it is a real significant financial commitment.

Mr. BACHUS. All right. Let me ask either one of you, you know, American is a part of the oneworld system, and you have some antitrust immunities. US Air is a part of the Star Alliance and you do not. Would a combination benefit in that regard?

Mr. JOHNSON. Well, the combination, yes, I think it will benefit travelers very extensively. We are a member of the Star Alliance, but we are in some respects a sort of second class member of the Star Alliance. We are not involved in the antitrust immunity joint venture. There is another Star Alliance partner, United Airlines, which is very much bigger than us.

By moving to the oneworld alliance, first and foremost, we take the smallest alliance and make it roughly the same size as the other two. We create opportunities for the oneworld partners to serve the East Coast of the United States in ways that they have not been able to before. They have certainly had access to American's hub at JFK and their hub at Miami, but those, as we have said, are kind of special purpose hubs that serve a unique clientele.

We have more typical distribution airline hubs in Philadelphia and Charlotte that will benefit oneworld considerably. So we think it is great. Mr. Kennedy? He knows a lot more about the antitrust immunity and that part of the business.

Mr. KENNEDY. As you may know, it took us about 13 years to get our deal finished and get the antitrust immunity, which is a good thing. We are behind the curve compared to the other——

Mr. BACHUS. And I think it is absolutely essential that you have that to be able to compete. That is a given to me. I would think it would be a disadvantage for US Air not to have it now. And this would be an advantage that would level the playing field for you.

Mr. KENNEDY. Yes, we would agree with that.

Mr. BACHUS. My last question, I heard you all say that American flies to 130 cities that US Airways does not fly. I think that was the number, was it?

Mr. JOHNSON. Correct.

Mr. BACHUS. And then US Airways flies to 62 cities that American Airlines does not serve.

Mr. JOHNSON. That is correct.

Mr. BACHUS. So I would think obviously that you are talking about 192 cities that would be any one who is a customer either American or US Airways would pick up an opportunity to fly on one airline to 192 cities, which would be a tremendous benefit.

Mr. JOHNSON. As we look at the opportunities to develop the network after the merger, Mr. Chairman, those 162 cities—sorry—192 cities are, you know, the leading candidates for added service.

Mr. BACHUS. All right. And again, I want to close where I tried to start when I complimented Mr. Kennedy. But US Airways has shown, I think, a lot of innovation. Here at Reagan I have noticed you are using two gates, and you have added probably 30 destinations, 30 or 40 new destinations, you know, all over the east. And I think you have shown of imagination in how you did that.

And as I said, I do not fly American that often. But, you know, if I am going to go to Dallas, I am not going to go to Charlotte first. I am going to fly American. And so I do not see how that is a competition. I mean, if I go to Dallas, I am going on American from Birmingham. If I got to D.C., I am not going to go through Dallas.

But the service, the reliability on US Air, the customer service is excellent. On the airplane, the on-time performance, and all the airlines. I heard something about baggage, but, my gosh, we have gone to 2 bags out of 1,000 are late. And it used to 5 and 10, so it is an incredible success there. You know, there was a time when, you know, there was a real chance that you did not get your bag, and for the airlines, they have made tremendous advances.

And I will say this. All the information says that airline tickets have not kept pace with inflation. I mean, it is one of the best deals going. I think it is six times less of an increase than oil prices, which is hard to believe when that is one of your main expenses. I do not how you do that other than investors losing $30 billion.

Mr. Cohen.

Mr. COHEN. Thank you, Mr. Bachus.

Mr. Mitchell, Professor Sagers, I just wonder, you know, we heard the testimony that there are 192 or whatever cities that are served by American and US Air exclusively, and that, you know, 132 are American. They do not compete, et cetera. And we heard the same thing with Delta-Northwest. Well, Delta-Northwest would be complementary because we do not serve too many routes together.

Does this kind of sound like some companies might have got together and cut up the country and determined, you know. When you look at like the statement that none of them have over 25 percent and there are four of them, but they are close to 25 percent and you multiply by 4, and that is 100, does not that sound like somebody is cutting up the pie?

Mr. SAGERS. Very briefly, there is no reason to suggest that they did this on purpose, that they got together and agreed to do this. This sort of lack of head to head competition, I mean, can be explained to some degree by the lack of a significant number of competitors. It was not a liberal firebrand who first came up with the idea that oligopolies do not compete with each other. It was George Stigler at the University of Chicago.

When there are a small number of competitors, it is easier for them to sort of implicitly agree not to compete vigorously head to head. So I do not know that that is exactly why the networks have developed as they are, and there are regulatory issues that have also contributed. But I think it is perfectly reasonable to suspect that that is a contributor to the current lack of overlap. Even if there is one, I do not think there is that big a lack of overlap frankly. And it is reasonable to expect that it will get worse when there are four big ones instead of five.

Mr. COHEN. Mr. Mitchell, do you agree or disagree?

Mr. MITCHELL. With his statement?

Mr. COHEN. Well, do you have an opinion on whether or not there was some type of, you know, Pillsbury bakeoff.

Mr. MITCHELL. You know, the way the hub system in this country developed over time is long and storied. But as soon as it

reached a certain point, there were market divisions going on where you stay out of my hub and I will stay out of your hub. I mean, this is as old as deregulation and before.

That is why it is so critically important that if we do go to three systems, three network systems, that we have all the consumer protections in place, we have all the transparency in place, because the NDC that I described earlier is the structure around which and through which the markets can be clearly, clearly divided. And that is going to be a problem far worse than a fare increase.

Mr. COHEN. What you described really scares me, and it sounds like big brother in a major way. And I understand you have talked to maybe my staff here on the Judiciary Committee about this. Is there legislation that you have suggested or proposed or would propose to counter this?

Mr. MITCHELL. Well, there is one piece of legislation that I think would be a very important consumer protection, and that would be we have this thing called Federal preemption where all of the consumer protections are consolidated at the DoT. The States have absolutely no authority here, and consumers have no rights at the State level.

Now, if you put in legislation that allows every single State to have its own consumer protection rules, you will have a big, expensive patchwork. However, like the energy industry, there is an opportunity to create one set of consumer protections that are enforceable at the state level. That would keep the airlines honest. And as we go down the three network carriers, there is more opportunity to be dismissive of customers, and we see it every day.

Mr. COHEN. We look forward to working with you on that. What do you see as the impact of the prior mergers, particularly Delta-Northwest, but also United-Continental, overall on air fare, service quality, and consumer choice? Has it been beneficial or not beneficial?

Mr. MITCHELL. I think that we have had the great recession, so it is very difficult to understand exactly what went on with pricing. However, I believe that if you look at all the promises, all the expectations, all of the projections, and studies, and analyses, before this merger is approved, there should be a forensic analysis of the outcomes of those two mergers. That is very, very important.

Mr. COHEN. Dr. Winston, you used the great recession as a reason why Delta would have cut the Memphis hub down to 40 percent, even though Mr. Anderson said it would not. Atlanta did not suffer. Why did Atlanta escape the great recession? They escaped Sherman. Why did they escape the great recession? They did not escape Sherman, excuse me.

Mr. WINSTON. Traffic. Still a lot of traffic there.

Mr. COHEN. Because they routed it from Memphis to Atlanta. That was simple enough. That was not the great recession. That was Anderson's decision.

Mr. WINSTON. The country did not stop flying during the great recession. The country still flew, and it was still flying as it normally does in the big hub areas. I mean, that is something that is sort of overlooked in this is that, again, most of the travel, like 75 percent of it, it is in large hub routes: New York, L.A., Chicago, San Francisco, D.C., New York. You know, you go through those,

and you have got most of the travel unfortunately in this country where you have got a lot of competitors. And that is where the airlines want to be.

I mean, unfortunately or fortunately, you know, there are other places to go, but it is a much, much smaller part of the system. And it is very vulnerable then to changes to what is going on in the macro economy and so on and so forth. But Atlanta is on the "good side" of things. Memphis unfortunately, it is not.

Mr. COHEN. But it was not because of the great recession. It was because they chose to divert the traffic. All of my colleagues who flew through Memphis preferred flying through Memphis from Louisiana, Arkansas, Mississippi. Now they have to go through it because they cut out the regional routes. They really eliminated Pinnacle Airlines from coming in to Memphis.

Mr. WINSTON. All else constant, I agree with you. Unfortunately all else is not constant. The airlines have to sort of, you know, route their planes where they are going to be able to maximize traffic.

Mr. COHEN. Do you agree that a fortress hub, the old legacy airlines created fortress hubs, and that fortress hubs can keep other carriers out of those markets through pricing strategies?

Mr. WINSTON. What keeps airlines out of other hubs or airports is airport policy, exclusive use gates. You want to improve competition in this industry? Start looking at airports. It is not the airlines, it is the airports, all right?

The estimates on the increases in fares due to exclusive use gates are in the billions of dollars, all right? So for the next hearing, can I suggest we explore airport privatization and allow airports to compete, and it could change an awful lot of what is going on in this industry.

Mr. COHEN. Well, eventually you will own China to own all of our airports. We are not selling

Let me ask this final question. Mr. Kennedy, you plan to keep Mr. Johnson at American Airlines, or your family does. Is that correct? He is going to continue to work for the merged airline? [Laughter.]

Mr. KENNEDY. Mr. Johnson?

Mr. COHEN. Yeah.

Mr. KENNEDY. I do not know. Do you want to work for the new airline? [Laughter.]

Mr. JOHNSON. I absolutely do.

Mr. COHEN. Good, because I do not want to waste ribs on him if he is not going to stay with the airline. [Laughter.]

And you come, too. And Elvis is living in Memphis, so there will be plenty of people still wanting to come there. Thank you.

Mr. JOHNSON. I will look forward to that, sir.

Mr. BACHUS. The CEOs started together at American Airlines.

Mr. JOHNSON. They did.

Mr. KENNEDY. They did, yes.

Mr. BACHUS. I would say this is the close of the hearing, but for the record, Southwest had not gone out of business, so there are four. There will be four networks at least. Some people may wish they had gone out of business.

We appreciate your testimony, and I will say for one that this is, as I said before, this is one of the most persuasive arguments from everything I have read for the merger. And as with any merger, there is a chance that there will be some, you know, price increases. But I do not guarantee there are going to be price increases in either respect because they cannot keep flying for what they are doing now.

But thank you for your testimony. I think that your next hearing will be in the Senate on the 19th. And hopefully this will prepare you for that, particularly if there is a senator from Memphis or——

[Laughter.]

Or Pittsburgh waiting on you over there. Thank you very much for your testimony.

Mr. JOHNSON. Thank you.

VOICE. Thank you, sir.

Mr. BACHUS. Without objection, all Members shall have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to as promptly as they can answer to be made a part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

With that, again I thank the witnesses.

This hearing is adjourned.

[Whereupon, at 12:27 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Material submitted by the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

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WATER RESOURCES AND ENVIRONMENT

March 6, 2013

The Honorable Spencer Bachus
Chairman
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Committee on the Judiciary
517 Cannon House Office Building
Washington, DC 20515

Dear Chairman Bachus:

I submit the attached document for the record at the request of my esteemed colleague, Representative William Lacy Clay of Missouri. I express no opinion as to the contents of the attached document.

As always, I remain,

Most sincerely,

Steve Cohen
Ranking Member
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Statement of Jim Tuller
Spokesperson, Former TWA Flight Attendants

Before the U.S. House Committee on the Judiciary
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law

Hearing on "Competition and Bankruptcy in the Airline Industry: The Proposed Merger of American Airlines and US Airways"

February 26, 2013

Chairman Bachus, Ranking Member Cohen and Members of the Subcommittee; thank you for the opportunity to submit this statement regarding the merger of my employer, American Airlines, with US Airways. My name is James Tuller and I am an American Airlines flight attendant and a member of the Association of Professional Flight Attendants (APFA). I was hired into the flight attendant job classification by Trans World Airlines in 1972 as one of the first male Flight Attendants hired after the federal circuit court of appeals decision in Diaz v. Pan Am, 442 F.2d. 385 (5th Cir., 1971), cert den., 404 U.S. 950 (1971). I was a founding member and served as Secretary-Treasurer of the independent union representing TWA flight Attendants. I represent the former TWA flight attendants who were acquired by American Airlines in the 2001 acquisition of TWA.

One of the great work force injustices in aviation history occurred in 2001 when the Association of Professional Flight Attendants, (APFA), 24,000 strong, took unilateral action against the 4,100 former TWA flight attendants by stripping them of their earned date of hire seniority from TWA. What does this mean? It means those with 20-30 or more years of seniority with TWA were placed at the bottom of the merged seniority list, junior to those hired just before the merger. The effect of this unilateral action is that without the earned date of hire occupational seniority, we are last in line to "bid and hold" the base closest to our homes and families.

Therefore, American Airlines continues to unnecessarily incur expense that is passed along to the consumer when the company has to transport almost a thousand former TWA flight attendants from their homes to their base cities on an average of over a thousand miles or more when we "commute" to work. Most of us lived in the city where we were based before the merger. After we were laid off and recalled to American, almost all of us are forced to commute very long distances in order to keep our jobs. This is a financial hardship for the company and for us personally.

One of the important issues to consider in the antitrust debate is the efficiency of cost as a result of an approved merger. In my personal situation, I could not fly from the base of my choosing, Lambert Airport in St. Louis. American had to bear the cost of my travel cross-country to "commute" to work at LaGuardia. (It wasn't until an American Flight Attendant was fired, that I got 100% lucky in a recent transfer to St. Louis, otherwise I'd still be stuck about 1,000 miles from home). Others fly from Minneapolis to Dallas-Fort Worth or Salt Lake to Miami to "commute" and then take their assigned work flights from there and return "home" the same way.

There are millions of dollars a year being wasted on a situation that can easily be remedied if Congress insists that it end. Otherwise, those expenses to fly almost one thousand former TWA flight attendants around the country will be hidden, tucked and passed along to the ultimate consumer, your constituents, in the form of ongoing higher ticket prices.

American Airlines did not create this situation. Unlike the APFA, American Airlines has always respected TWA seniority and the TWA flight attendants have responded by being the best flight attendants they can be. American gave us all the pay and benefits we earned, but American remains the financial hostage of increased and unnecessary expenditures because of the unilateral actions of the APFA. This is because occupational seniority is in the sole jurisdiction of the APFA, not the company. American has no say about what the APFA did that has caused an unnecessary increase in its expenditures. Understandably, American does not want to rock the boat with the APFA union over a few million dollars. But now Congress has the chance and obligation to help right the wrong and reduce the wasteful pass-through of expenditures to your constituents.

The history that brought us to this point is complex, but the solution is simple. It would not require Congressional legislation, although there was Congressional legislation in 2007 that ostensibly tried to address this situation. That legislation, known as the McCaskill-Bond Amendment, is now the barrier to the fair resolution of this problem. The reason that is the case is because APFA will claim that it integrated the flight list in 2001 placing TWA at the bottom of the list. The law was passed in 2007. In this 2013 merger, all they are doing is integrating the two lists from USAirways and American, *as the lists exist today with TWA at the bottom*. This will forever place us on the bottom of over 20,000 merged flight attendants, except for new hires.

One former U.S. Senator has advised that if this issue cannot be resolved in the context of this merger, that a Duty of Fair Representation lawsuit should be filed against the APFA as well as an injunction against the entire merger. Because the damages and harm inflicted upon the TWA flight attendants is permanent and irreparable it will likely be sustained in an injunction.

We are here to tell Congress and other reviewing agencies that we are in favor of the merger, but only if the outrageous injustices you will hear about are resolved before the merger. We don't need litigation to resolve this but will not be afraid to vindicate our rights --- especially when what transpired is an admitted "mistake." We need to write a new chapter in the non-partisan "Profiles in Courage." We concur in Chairman Goodlatte's expressed sentiment that antitrust law is "non-partisan." So is the solution to this problem.

The History

Seniority integration by date of hire has long been recognized by labor and management as the fairest and most equitable method of determining seniority integration in a merger and acquisition. It is the cornerstone of the Allegheny-Mohawk Labor Protective Provisions. (LPPs) of which Sections 3 & 13 were incorporated into the McCaskill-Bond legislation in 2007. Date of Hire integration of seniority lists is the only method that is blind and neutral and does not seek to advantage or disadvantage any worker over another. It simply recognizes each individual's time on the job from the first day of hire.

As a result of the treatment of the TWA flight attendants by the APFA in 2001, Congress in 2007 intervened into labor matters to enact the McCaskill-Bond amendment to statutorily mandate Sections 3 & 13 of the Allegheny-Mohawk Labor Protective Provisions to include "fair and equitable" seniority list integration in all future mergers. (Tab #1, Page 2, lines 3-10, statutorily codifying the Civil Aeronautics Board ruling). Congress did this in part because the old CAB was disbanded leaving no one to enforce these provisions.

During that time period, APFA took advantage of the lack of enforcement without a CAB around, and "stapled" the former TWA to the bottom. McCaskill-Bond will arguably prevent what happened to the TWA workers from happening again. However, for reasons discussed below, the amendment that passed in December of 2007 as part of the FY 2008 Omnibus bill, did not apply to the TWA flight attendants.

Unlike most unions in the airline industry, APFA did not support the McCaskill-Bond legislation to include their own TWA members. Senator McCaskill expressed her displeasure with the APFA stating, "I was disappointed that you chose not to endorse my Allegheny-Mohawk legislation despite my repeated requests." (Tab #2, Senator McCaskill letter of January 3, 2008, page two, first paragraph).

The most recent contract up until the merger ignored Congress' mandate in McCaskill-Bond. It states that if American acquires another company the APFA will use *any* method determined by them to integrate seniority, not "fair and equitable" integration. However, selfishly, the contract says if another Company acquires them, then the "fair and equitable" standard applies. (Tab #3, "Article 1 Recognition and Merger/Acquisition Protection", see highlighted pages 1 and 2).

Furthermore, Senator McCaskill recognized that this legislation was not the final resolution to the problem. In her December 17, 2007 press release with Senator Kit Bond, she said, "This provision is an important piece of the puzzle to ensure workers in the future don't suffer the same fate as the TWA workers. I'm also hopeful it will aid in negotiations towards a final settlement for those workers." (Tab #4, Press Release). Unfortunately, APFA has intentionally ignored and rebuffed any and all attempts for further negotiations to resolve the TWA seniority integration issue.

This indifference is a consistent pattern of ignoring Congressional requests to meet and discuss a resolution and prompted Senator McCaskill's predecessor, Senator Jim Talent, to cogently analyze the situation when he wrote to the TWA Flight Attendants and said, "In all my years in public office and in the years when I practiced labor law, I have never seen an acquisition that was as disadvantageous to one of the former employee groups as this one." (Tab #5, Senator Talent letter, November 6, 2006).

The fact is whatever transpired in the past is now acknowledged by the APFA as an admitted "mistake." APFA President Laura Glading has submitted testimony before this Committee but she did not include in her comments praising the merger the history of the APFA's outrageous actions against her own members, the former TWA flight attendants. Ms Glading did not mention that their actions have cost and will continue to cost American Airlines millions in unnecessary transportation costs that will continue to be passed on to consumers unless this is resolved.

In the June 21, 2012 Editorial Board interview with the Fort Worth Star-Telegram, APFA President Glading was asked by the Star Telegram, "*Who gets seniority if USAirways/American Airlines are*

Merged?" Sitting next to Ms. Glading during that interview was US Airways CEO Doug Parker. She responded, "*I'll take that one. Because we really screwed up on that one big time with the flight attendants. When we merged with TWA, the company did give them top pay but we stapled them to the bottom of our seniority list. That was a mistake.... I have said publicly and in my sleep that I would be very much for date of hire seniority integration. That's what the AFA would like and I've talked with AFA every day.*" (Tab #6, Page 7 of transcript, emphasis added).

The Association of Flight Attendants, (AFA) is the union for USAirways and is the largest flight attendant union in the AFL-CIO and in the country with over 60,000 members. AFA's full support of our position is noted in the June 16, 2011 letter sent to Chairman Rockefeller as we attempted to get legislation passed to close the loophole in the McCaskill-Bond legislation to include us prospectively. The AFA noted, "*It is wrong that the very people whose treatment necessitated a change in the law were not protected by that law. Former TWA flight attendants have suffered extraordinary harm from the ill-advised seniority stapling.... Should American merge again, former TWA flight attendants will be further disadvantaged as the only group to receive no seniority integration whatsoever.... We encourage Congress to take legislative action to end this injustice.*" (Tab #7, AFA letter to Senator Rockefeller, emphasis added).

Since that time, Ms. Glading has done nothing to correct this admitted mistake. I am testifying today that the TWA flight attendants will be harmed yet again in this proposed merger when all flight attendants are integrated by their Date of Hire seniority date except those of us whose seniority number was unilaterally changed by the APFA. This self-inflicted injury by APFA can be unilaterally corrected by APFA. The APFA Board did it in 2001 without sending it to a membership vote and they can undo their admitted mistake the same way.

The following list of injuries intentionally inflicted on the TWA workers by the APFA is well documented and costs American. The financial pass-through of APFA's injustice is done in the hope the merger will sweep this injustice under the rug and no one will know your constituents picked up the tab for this admitted mistake.

A few months ago, American Airlines offered a $40,000 lump sum cash buyout to senior employees to leave the company. 2,250 flight attendants accepted that offer and starting December 1, 2012, through September 30, 2013, they will be leaving the company on the basis of their earned occupational seniority. One who took the buyout was former Ozark/TWA/American flight attendant Amy Ludwig, of St. Louis, MO. Amy started flying in 1969 and in the spirit of the current law, when TWA acquired Ozark Airlines in 1986, Amy did not lose a single day of seniority or a minute of pay. The TWA flight attendants integrated the Ozark flight attendants into the system seniority list by their date of hire and both groups have been working side by side ever since. When TWA acquired Ozark, the TWA attendants outnumbered the Ozark Flight attendants by a 9:1 ratio.

At age 64, Amy was dying of stage 4 ovarian cancer. With 45 years of service in the airline industry, but with no bidding seniority to allow her to select the month she wished to retire, Amy was "awarded" one of the later departure dates in June, 2013. She called APFA to advise them she was unlikely to live until June of 2013 and request that she be allowed a hardship departure date to leave with her buyout money to pay her medical bills and final expenses.

APFA refused to consider her request and told her if she died before her June departure date she would forfeit the money she would otherwise receive and her heirs could not receive anything to

pay for her final expenses even though she timely applied for the buyout. Amy died heartbroken and penniless on December 18, 2012 telling her TWA colleagues at her bedside that her dying wish was that they would get their earned seniority. (Tab #8, Amy Ludwig's Buyout June 2013 departure date).

The most recent slap at the TWA flight attendants from APFA comes from an entitlement to stock in the reorganized company when American Airlines emerges from bankruptcy. As part of the concessionary contract, American Airlines granted a 3% equity stake in the company to the flight attendant work force. As the bargaining representative of the flight attendants, APFA devised a method of distribution that disenfranchises all the former TWA flight attendants. They did this by using a look back period of W-2 earnings from the company when all the TWA attendants were unemployed from American for some or all of that period of time. (Tab #9, Page 1 of 4, APFA Board Vote on Resolution for Arbitrary Look-Back, passes 9 to 7, Laura Glading, maker). To disenfranchise one segment of the membership when all were laid off due to their unilateral placement on the seniority list by APFA makes a mockery of their duty of fair representation.

After the 2001 merger every former TWA flight attendant was laid off from their position after 9/11. Had we retained our earned seniority to protect us, more than 90% would not have been subject to that reduction in force. The sad irony is that Ms. Jo Ann Schuetz, a former TWA, now American Flight Attendant has the most time on the job in the flight attendant job classification. She started flying in March 1960. Because of APFA's actions to deprive her of her seniority, instead of being Number 1 in seniority, she is now number 15,032 out of 16,183 on the system seniority list. This is patently unfair. There is a cost to keeping the myth of APFA's labor harmony and your constituents should not be the one's financially sacrificed for APFA's benefit.

The last group of TWA flight attendants was finally recalled to their job at American in November of 2012. Over the many years of unemployment the TWA flight attendants lost over 2.1 billion dollars in lost wages, Social Security earnings and pension benefits. (There were more than 4,100 TWA Flight Attendants employed when American acquired TWA making an average of $50,000 per year in salary and benefits, over 10 years is $2.1 Billion. That money wound up in someone else's pockets because we were denied our earned seniority and were furloughed --- now and admitted 'mistake' and 'screw-up').

In a final indignity, APFA negotiated away our severance pay so that the most senior flight attendants went to the street empty handed. This was not something American asked for. APFA simply volunteered it when the APFA knew every TWA flight attendant would be laid off. After my 9/11 furlough, I did not receive my final recall until October 2010, effective December 17, 2010. (Tab #10, recall notice). Had I not been deprived of my seniority, I would have been able to retire several years ago. But because of the deprivation of years of income, I and my TWA colleagues will not leave on a modest buyout package, but are constrained to work the rest of our lives to make up for the lost income.

The loss of all TWA seniority might have been mitigated somewhat had APFA kept it's promise in the so-called Seniority Integration Agreement they wrote promising that we would retain our TWA seniority in our TWA base of St. Louis which TWA brought to the merger. APFA reneged on that promise and refused to allow us to file a grievance when the agreement was violated. (Tab #11, Seniority Integration Agreement, Page 3, VI., "Seniority at St. Louis Flight Attendant Bases").

When we were finally recalled to the job, we were forced to leave home and go to the least desirable bases that had vacancies, usually hundreds if not thousands of miles from our homes and families. We face a "double taxation" by suffering further expense after years of unemployment or underemployment in paying for additional housing and transportation. Often that expense is greater than our original mortgage at home in expensive assigned base cities such as New York and Miami.

APFA has deprived us of our voting rights and twice the US Department of Labor has had to intervene and force APFA to count TWA ballots or run a whole new election. (Tab #12, Dept. of Labor Election Removal Letter).

To make it extremely difficult for the former TWA members to vote in union elections, APFA changed their Constitution to require the full payment of union dues when we were unemployed. (Tab #13, APFA Constitution in July 2009 exempting "furloughed" employees from dues, page 2; Tab #14, APFA Board Resolution, November 3-4, 2009, changing the APFA Constitution to include furloughed members for dues obligations). Unless we pay the dues when we were unemployed and not represented by APFA we are deprived of membership in good standing. This means we cannot vote in union elections or run for office, attend informational meetings, access the APFA website, or even travel as invited members with APFA to Capitol Hill. This newly imposed financial burden acts like any Poll Tax in suppressing our ability to speak out about the mistreatment by our union with our vote or even about our working conditions.

In spite of following all the procedures for paying dues under the changed APFA Constitution, the APFA refuses to return me to membership in good standing. Even if one tries to pay the current monthly payment, the APFA, with no written policy to do this, applies the money to the oldest outstanding arrearages and prevents anyone from being current in order to continue the suppression.

In fact, Laura Glading would not be submitting testimony to this Subcommittee as APFA President but for the Poll Tax that was instituted under her leadership. In the most recent national officer elections, Ms. Glading was narrowly re-elected in a runoff election by 150 votes because most of the remaining 950 TWA flight attendants who did not support her were not eligible to vote. (Tab #15, APFA, vote results from last election).

The Solution

The solution to this problem is simple and the time to do it is now. As the 2,250 flight attendants leave the company with the buyout through September 30, 2013, APFA can slot in the 950 TWA flight attendants who remain and everyone still moves up the seniority list.

There is no credible harm to any other member of the APFA bargaining unit; the super seniority they all have received at our expense will simply come to an end. The TWA workers are not looking for economic damages because those devastating damages are too great and would bankrupt the APFA. We are not seeking back pay, any back benefits, or any reinstatement of recall rights. We will gladly sign a legally binding release of any and all claims against APFA and American Airlines. We simply want our dignity restored that recognizes our years of service as flight attendants.

In fact, if the merger between American and USAir is approved, APFA has agreed that AFA members from USAir will assume their rightful date of hire position *above* thousands of American Flight Attendants. If there were harm to the American Flight Attendants, APFA would not agree to give date of hire seniority to AFA members *above* their own.

Any APFA claim of harm to the membership from slotting in the remaining 950 *TWA Flight Attendants* and *no* claim of harm from close to *7,000 AFA USAir Flight Attendants many of whom* will be integrated *above* thousands of American Flight Attendants is patently specious and absurd on its face.

The practical effect is when we return to our proper place on the seniority list, no American Airlines flight attendant will suffer any economic harm. They will continue to earn the same salary. They will earn the same benefits they currently earn. They will not lose their domestic or international bases. The TWA attendants will be slotted into the list at their proper place and bid for bases as vacancies occur and assignments just like every other current American flight attendant does.

There will be no base displacement to any current APFA member. That is because only the Company, not the APFA, determines if there is an operational need to increase the flight attendant headcount at a particular base. If there is an operational need for increased staffing, the TWA flight attendants will have to bid for transfer to the base of their choice. They cannot displace a current APFA member from that base. There is no harm to anybody by allowing us to bid for assignments just like every other flight attendant.

There is no harm to American Airlines. All employment records are computerized and the actual seniority dates are in their employment records. (Tab #16, showing occupational "Occ" seniority hiring date of June 28, 1972; yet my 'acquisition date' for APFA is April 10, 2001, the merger date. In effect, APFA threw almost 29 years of seniority in the trash can.) All that would be required to fix this problem would be to re-sort the list of names to utilize the original TWA occupational seniority dates. Those administrative programming changes would take just a few minutes to re-sort the list.

TWA flight attendants have always been a tiny minority of the work force and we have never been looking for a handout. If there is a merger, the TWA flight attendants will be less than 4% of the entire flight attendant workforce of the merged airlines. TWA brought physical assets to merger to sustain our own jobs. American Airlines could not have operated the TWA aircraft without us because each carrier has its own operating certificate until there is a complete merger of both operations. APFA cost American Airlines several millions of dollars when American had to lay us off and train their F/A's on the TWA operating certificate to continue to operate our TWA aircraft.

The only claim APFA and any other detractor from the truth could make is that this issue has been litigated in the courts against the TWA FA's in the past. This is not a valid argument. The APFA cannot produce one court case where the federal or state court held that the Seniority Integration Agreement ("SIA") that placed the TWA FA's at the bottom of the occupational seniority list is a valid contract between the proper parties (the American Flight Attendants and the TWA Flight Attendants). There was never a legal determination which said that was the case. The only cases that APFA can point to are ones where there was a procedural ruling that the proper parties weren't before the court and other similar rulings. There was never a legal holding on the substantive merits that any Seniority Integration Agreement was valid; none.

Furthermore, any legal argument APFA may have is waived in light of the admission by their President Laura Glading that they made a "mistake" and "screwed up big time."

Secondly, the APFA may try to say that the Seniority Integration Agreement (SIA) that placed the TWA FA'S at the bottom was a negotiated agreement and a contract. That is an untenable position when the true facts are revealed. The SIA was a unilateral document prepared in 2001 by the APFA after it refused to negotiate with the IAM who represented the TWA Flight Attendants at the time. The ostensible "Agreement" (sic) was a document presented to American Airlines, not the IAM or any TWA flight attendants, declaring among other things that the TWA occupational seniority commenced on the Date of Acquisition, April 10, 2001, not their original date of hire.

Whether the APFA gave the full occupational seniority to the TWA Flight Attendant's or deprived the TWA FA's of their occupational seniority in the SIA as they did here, American Airlines would have signed their acknowledgement to this unilateral act. This is because the determination of occupational seniority is the sole jurisdiction of the Union, not the Company. It was for the APFA to decide how to handle the TWA seniority, not American. American merely acknowledged what APFA decided to do.

I am very proud of the TWA flight attendants who are professionals on the job as well as fighters for justice. Justice has been a long time coming and this injustice must end now. We will not allow this issue to be swept under the rug. It is past time for the APFA to correct their admitted mistake and treat the former TWA flight attendants as they want to be treated in the merger with US Airways.

The solution is simple. Why let a renegade group allow an entire merger to be jeopardized because of an admitted mistake just because they lack the courage to correct it? Why let the APFA pass on its mistakes in the form of a hidden increase in fees to your constituents? Why not show the courage to end the injustice that was recognized by Senator McCaskill and Senator Talent? Let the former TWA have their last measure of earned dignity and allow them to move forward with a new and brighter future in a merged airline.

For this merger to have any chance of success, all members of the new company MUST feel included and ALL, management and union, employees and shareholders alike, must work together to achieve this goal.

The time for injustice has ended; the time for courage is now.

ATTACHMENT

TAB #1

2007 McCaskill-Bond Amendment

See Page 2, lines 3-10

O:\BAI\BAI07824.xml S.L.C.

AMENDMENT NO. Calendar No.

Purpose: To provide for the fair and equitable resolution of labor integration issues.

IN THE SENATE OF THE UNITED STATES—110th Cong., 1st Sess.

S. 1300

To amend title 49, United States Code, to authorize appropriations for the Federal Aviation Administration for fiscal years 2008 through 2011, to improve aviation safety and capacity, to modernize the air traffic control system, and for other purposes.

Referred to the Committee on and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by

Viz:

At the appropriate place, insert the following:

SEC. . FAIR AND EQUITABLE RESOLUTION OF LABOR INTEGRATION ISSUES.

(a) APPLICATION OF RAILWAY LABOR ACT TO MERGERS AND ACQUISITIONS.—Section 6 of the Railway Labor Act (45 U.S.C. 156) is amended by inserting ", including changes sought in the context of a merger or acquisition

involving the carrier," after "written notice of an intended change in agreements".

(b) LABOR INTEGRATION.-With respect to any covered transaction involving a covered air carrier that results in the combination of crafts or classes that are subject to the Railway Labor Act (45 U.S.C. 151 et seq.), the labor protective provisions imposed by the Civil Aeronautics Board in the Allegheny-Mohawk merger (as published at 59 C.A.B. 45) shall apply to the covered employees of the covered air carrier.

(c) ENFORCEMENT.-Any individual (including any labor organization that represents the individual) who is aggrieved as a result of a violation of the labor protective provisions applied under subsection (a) may bring an action to enforce this section, or to enforce the terms of any award or agreement resulting from arbitration or a settlement relating to the requirements of this section. An action under this subsection shall be brought in an appropriate Federal district court, determined in accordance with section 1391 of title 28, United States Code, without regard to the amount in controversy.

(d) DEFINITIONS.-In this section:

(1) AIR CARRIER.-The term "air carrier" means an air carrier that holds a certificate issued under chapter 411 of title 49, United States Code.

(2) COVERED AIR CARRIER.—The term "covered air carrier" means an air carrier that is involved in a covered transaction.

(3) COVERED EMPLOYEE.—The term "covered employee" means an employee who—

(A) is not a temporary employee; and

(B) is a member of a craft or class that is subject to the Railway Labor Act (45 U.S.C. 151 et seq.).

(4) COVERED TRANSACTION.—The term "covered transaction" means a transaction that—

(A) is a transaction for the combination of multiple air carriers into a single air carrier; and

(B) involves the transfer of ownership or control of—

(i) 50 percent or more of the equity securities (as defined in section 101 of title 11, United States Code) of an air carrier; or

(ii) 50 percent or more (by value) of the assets of the air carrier.

TAB #2

Senator McCaskill Letter of January 3, 2008 to APFA

See Page 2, First Paragraph

CLAIRE McCASKILL
MISSOURI

United States Senate
WASHINGTON, DC 20510

ARMED SERVICES
COMMERCE, SCIENCE AND TRANSPORTATION
HOMELAND SECURITY AND GOVERNMENT AFFAIRS
INDIAN AFFAIRS
SPECIAL COMMITTEE ON AGING
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

January 3, 2008

Tommie Hutto-Blake
President
Association of Professional Flight Attendants
1004 West Euless Blvd.
Euless, TX 76040

Dear Tommie:

It is my understanding that there some concerns within your union regarding the negotiated settlement between APFA and American Airlines with respect to the recall rights of American's furloughed flight attendants. I am writing to provide my perspective and hope to clear up any confusion with your members.

As you are well aware, the April 2001 merger of American Airlines and TWA proved to be a nightmare for thousands of flight attendants. The events of 9/11 led to widespread layoffs, and the five-year recall rights simply weren't enough to give these workers any hope of securing their jobs. At the same time, the federal government was providing millions of dollars in taxpayer-supported funding for American Airlines. It didn't seem fair to focus solely on the corporation, and not the workers who had put their lives on hold waiting for a recall. I promised during my 2006 Senate campaign that I would take every step to bring American and APFA together to reach an agreement that would extend the recall rights for these workers. After I was sworn in, I set about to do just that.

Additionally, from Washington I began an effort to pass legislation that would implement Allegheny-Mohawk labor protective processes for all future airline industry mergers. I am convinced that another wave of industry consolidation is on its way, and we simply cannot allow thousands of additional workers to find themselves stapled to the bottom of a seniority list. The Allegheny-Mohawk process will ensure that labor has a seat at the table if airlines merge, and that if a seniority agreement cannot be reached, a fair mediation process is guaranteed as a backup.

The Senate Commerce Committee in May 2007 amended the pending FAA Reauthorization bill with my legislation guaranteeing Allegheny-Mohawk protections. Working with Rep. Russ Carnahan, the House of Representatives in September 2007 passed a bill mandating Allegheny-Mohawk protections. In November, I became concerned that the underlying FAA Reauthorization bill would be stalled, however, and ultimately Sen. Kit Bond and I were able to attach Allegheny-Mohawk protections to a government spending bill signed into law late last month.

Ms.
Hutto-Blake
January 3, 2008
Page Two

It is important to note that adoption of Allegheny-Mohawk protections was never a question of "if" - it was simply a question of "when". I was disappointed that you chose not to endorse my Allegheny-Mohawk legislation, despite my repeated requests. I remain convinced that this legislation will strengthen both the industry and its dedicated workforce.

The negotiations between APFA and American Airlines were difficult to jumpstart. The issue of furloughed workers had simmered for over five years, and both sides were reluctant to attempt to reach any agreement. As you recall, I spoke with both you and Gerard Arpey to advise that if my efforts at a voluntary agreement were not successful, I would seek a legislative solution - and could not guarantee that either side would be happy with the outcome. As a matter of simple fairness to the furloughed workers - as well as keeping my 2006 pledge - I was not going to take "no" for an answer from either side.

I was delighted that together, American Airlines and APFA reached an agreement that will extend the recall rights for the remaining furloughed flight attendants. Of course I would have preferred an agreement that would have covered all flight attendants, including those who have lost their recall rights, but the compromise agreement will finally provide relief for the most senior flight attendants still on the recall lists. I appreciate your role in ending a five-year ordeal for hundreds of your members.

I hope this letter will clear up any misconceptions, and urge you to share it with your
members.

Sincerely,

Claire
McCaskill
Senator

TAB #3

Article 1 – Recognition & Merger/Acquisition Protection

APFA Contract

See Highlighted Language

ARTICLE 1 - RECOGNITION AND MERGER/ACQUISITION PROTECTION

A. RECOGNITION OF APFA AS EXCLUSIVE BARGAINING AGENT

In accordance with the certification from the National Mediation Board, Case R-4711 dated May 16, 1977, the Company recognizes the Association of Professional Flight Attendants as the exclusive and sole collective bargaining agency for Flight Attendants in the employ of the Company for the purposes of the Railway Labor Act.

B. MERGER AND ACQUISITION PROTECTION LANGUAGE

1. The Agreement shall be binding upon any Successor. The Company shall not bring a single step or multi-step Successorship Transaction to final conclusion unless the Successor agrees, in writing, to recognize APFA as the representative of Flight Attendants on the American Airlines Flight Attendant Seniority List consistent with the Railway Labor Act, to employ the Flight Attendants on the American Airlines Flight Attendant Seniority List in accordance with the provisions of this Agreement, and to assume and be bound by this Agreement

a. The term "Successor" shall include, without limitation, any assignee, purchaser, transferee, administrator, receiver, executor, and/or trustee of the Company or of all or substantially all of the equity securities and/or assets of the Company.

b. The term "Successorship Transaction" means any transaction, whether single step or multi-step, that provides for, results in, or creates a Successor.

2. If the Successor is an Air Carrier (any common carrier by air) or an affiliate of an Air Carrier, the Company shall, at the option of APFA, and prior to finally concluding a Successorship Transaction, require the Successor to agree to integrate the pre-transaction Flight Attendant seniority lists of the Company and the Successor in a fair and equitable manner within 12 months of the Successorship transaction pursuant to Sections 3 and 13 of the Allegheny-Mohawk Labor Protective Provisions ("LPPs").

3. The provisions of paragraphs 1. and 2. above do not apply to the Company's acquisition of all or part of another Air Carrier in a transaction which includes the acquisition of aircraft and Flight Attendants.

4. In the event that, within any 12 month period, the Company transfers (by sale, lease or other transaction) or otherwise disposes of aircraft, slots, or route authorities ("Aircraft-Related Assets") which, net of Aircraft-Related Asset purchases or acquisitions during the same 12 month period, constitute 40% or more of the value of the Aircraft-Related Assets of the Company to an entity or to a group of entities acting in concert that is an Air Carrier or that will operate as an Air Carrier following its acquisition of the transferred Aircraft-Related Assets (any such entity or group, the "Transferee"; any such transaction, a "Substantial Aircraft-Related Asset Sale"):

a. the Company shall require the Transferee to proffer employment to Flight

attendants from the American Airlines Flight Attendant Seniority List in strict seniority order (the "Transferring Flight Attendants"). The number of Transferring Flight Attendants shall be no fewer than the average monthly Flight Attendant staffing over the prior 12 months for the Aircraft-Related Assets transferred to the Transferee in connection with the Substantial Aircraft-Related Asset Sale; and

b. the Company shall not finally conclude a transaction under this subsection unless the Transferee agrees to integrate the Transferring Flight Attendants into the Transferee's Flight Attendant seniority list pursuant to Sections 3 and 13 of the Allegheny-Mohawk LPPs.

11

5. In the event the Company acquires another air carrier, merges the operations of the acquired carrier with the Company's operations and, as part of the merger, employs Flight Attendants of the acquired carrier, the combined seniority list of the two carriers for the Flight Attendants who are employed by the Company as part of the merger shall be pursuant to a method to be determined by the APFA. Such combined seniority list integration shall not require a system flush and/or system rebid. In addition, the APFA will use best efforts to provide the combined seniority list to the Company no later than ninety (90) days following the date on which the acquisition closes.

6. Remedies

a. The Company and APFA agree to arbitrate any grievance filed by the other party alleging a violation of Article 1 of the Agreement on an expedited basis directly before the System Board of Adjustment sitting with a neutral arbitrator. The arbitrator shall be member of the National Academy of Arbitrators and experienced in airline industry disputes. The burden of proof will be determined by the arbitrator. The provisions of the Railway Labor Act shall apply to resolution of any dispute regarding this Article.

b. The parties agree that, in addition to any other rights and remedies available under law and this Agreement, an arbitration award under Article 1 of the Agreement shall be enforceable by equitable remedies, including injunctions and specific performance against the Company and/or AMR Corp. and/or an Affiliate Company. The Company and the Association agree that in a court proceeding to enforce an arbitration award under Article 1 of the Agreement, the rights and obligations are equitable in nature, that there are no adequate remedies at law for the enforcement of such rights and obligations, and that the APFA and the Company's Flight Attendants are irreparably injured by the violation of Article 1 of the agreement.

The term "Affiliate" refers to (a) any entity that controls the Company or any entity that the Company controls, and/or (b) any other corporate subsidiary, parent, or entity controlled by or that controls any entity referred to in (a) immediately above.

TAB #4

McCaskill-Bond Press Release

December 17, 2007

McCaskill and Bond Work to Protect Airline Workers in Mergers Provision included in spending bill would prevent scenarios similar to TWA – American Airline merger

December 17, 2007

WASHINGTON, D.C. - Less than a week after Lufthansa agreed to purchase 19% of Jet Blue, a struggling U.S. carrier, U.S. Senators Claire McCaskill and Kit Bond today secured a provision to the Senate's omnibus spending bill to provide air carrier employees with a base level of protection during mergers. With 1,253 former TWA employees still at risk of losing recall rights five years after being laid off from TWA's merger with American, McCaskill and Bond are seeking to prevent similar scenarios from occurring in the future. The provision would ensure a merger process by which airline employees seniority lists can be integrated in a fair manner. If a dispute occurs, the parties can engage in binding arbitration. This provision would make it harder for one airline or union to add the employees of another airline or union to the bottom of the seniority list. Thousands of former TWA flight attendants lost their seniority after American Airlines acquired TWA and were furloughed after September 11. This provision would help prevent such occurrences in the future.

In addition to the recent news about the Lufthansa investment in Jet Blue, news reports are fanning rumors about the potential for other major commercial airlines to engage in mergers. McCaskill, who successfully offered a similar amendment to the Federal Aviation Administration Reauthorization Act in May, believed that the recent talk of mergers raised the level of urgency to sign such protections into law. She was pleased to work with Bond, along with U.S. Senator Dick Durbin (D-IL), to ensure the provision was included in the omnibus spending bill. The bill is expected to pass in both chambers and to be signed into law by the holiday recess.

"This provision is an important piece of the puzzle to ensure workers in the future don't suffer the same fate as the TWA workers. I'm also hopeful it will aid in negotiations towards a final settlement for those workers," McCaskill said.

"Our TWA workers were given promises and only got pink slips, this provision is a critical step in protecting airline workers from this fate in the future," said Bond. "It was a pleasure to work with Senator McCaskill to secure these protections.

TAB #5

Senator Jim Talent Letter to TWA

November 2, 2006

JAMES M. TALENT
MISSOURI
senator@talent.senate.gov

CHAIRMAN
SUBCOMMITTEE ON SEAPOWER
CHAIRMAN
SUBCOMMITTEE ON MARKETING, INSPECTION
AND PRODUCT PROMOTION

DEPUTY MAJORITY WHIP

United States Senate

459 RUSSELL SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224-6154
FAX: (202) 228-1518

COMMITTEES:
ARMED SERVICES
AGRICULTURE, NUTRITION AND FORESTRY
ENERGY AND NATURAL RESOURCES
SPECIAL COMMITTEE ON AGING

November 2, 2006

Dear Former TWA Flight Attendants:

Thank you for contacting me regarding the extension of recall rights for former TWA flight attendants. I appreciate the time you have taken to share your views with me, and I welcome the opportunity to respond.

As you know, as a result of the failure of American Airlines to honor its commitments during the acquisition of TWA, the former TWA flight attendants were stapled to the bottom of the seniority list. In all my years in public office and in the years when I practiced labor law, I have never seen an acquisition that was as disadvantageous to one of the former employee groups as this one. The former TWA flight attendants are the hardest working and most dedicated men and women in the industry, and they deserve the right to be recalled to their jobs.

I believe that these recall rights must be extended. At the request of TWA flight attendants, Senator Bond and I sent a letter to the American Airlines President and CEO urging the extension of recall rights. In addition, I have pledged to pursue every option, including legislation, in order to extend these recall rights. I look forward to continuing to work with former TWA flight attendants when the senate returns to session.

The extension of recall rights for former TWA flight attendants is a matter of basic fairness and I will pursue every option to extend these rights. If I may be of further assistance, please don't hesitate to call or write.

Sincerely,

James M. Talent
United States Senator

THREE CITY PLACE DRIVE
SUITE 1020
ST. LOUIS, MO 63141
PHONE: (314) 432-8211
FAX: (314) 432-8963

1734 WEST SUNSHINE
SUITE 302
SPRINGFIELD, MO 65807
PHONE: (417) 881-0735
FAX: (417) 881-2467

105 EAST HIGH STREET, 2ND FLOOR
JEFFERSON CITY, MO 65101
PHONE: (573) 635-7370
FAX: (573) 636-2831

WHITTAKER FEDERAL COURTHOUSE
400 EAST 9TH STREET
SUITE 40 PLAZA LEVEL
KANSAS CITY, MO 64106
PHONE: (816) 931-1606
FAX: (816) 471-7982

329 BROADWAY, ROOM 109
CAPE GIRARDEAU, MO 63701
PHONE: (573) 651-0964
FAX: (573) 334-4016

TAB #6

APFA President Laura Glading

Fort Worth Star Telegram Editorial Board Interview

June 21, 2012, Page 7

same package as US Air, even a sweeter deal, I would still be for this merger. It's not really so much what's in the contract as it is having a future, getting back that feeling that we had 30, 40 years ago when we first put the uniform on, getting the best airline possible. I firmly believe this opportunity will get us there. That's why I'm here.

ST: Are you guaranteeing that everyone that is employed there will have a job?

Parker: In the terms that we have with these guys [points to APA and APFA] yes, there are "no furlough protections" for the existing employees.

ST: There were seniority integration issues with the American-TWA merger. Who gets seniority if US Airways/American Airlines are merged?

Glading: I'll take that one. Because we really screwed up on that big time with the flight attendants. When we merged with TWA, the company did give them top pay but we stapled them to the bottom of our seniority list. That was a mistake. But we did. So before at that time though there wasn't the Allegheny–Mohawk provision was not legislated. Since then in December of 2007, McCaskill–Bond put together an amendment to the omnibus bill that said that seniority integration has to be agreed upon by the parties, if it's not it goes to this binding arbitration process. So now we have this backstop. That backstop will now be in place for the pilots.

As you know the East-West pilots at US Air still have a bit of a struggle, the TWA [pilots] still have a bit of an issue with the seniority at APA, so we'll have a way of ending all of that and integrating. I have said publicly and privately and in my sleep that I would be very much for a date of hire seniority integration. That's what APA would like and I've talked with AFA every day. We're all very enthusiastic about this. I don't want to speak for them, they're in contract negotiations but I can tell you, I do not see any upset with this seniority integration for the flight attendants at least.

Little: That's the same thing with the IAM on the property. I told them I said my preference would be integrating, dovetailing everyone together I said because you end up spending the next X amount of years you're on the property all complaining about seniority. And my first incident with American on seniority integration was going back to TransCaribbean. I still know people who worked for TransCaribbean who are still complaining about seniority and that goes back to 1970. So seniority is an issue that you deal with. So I think I've always taken the position, even though it didn't happen with TWA as you brought up, we arbitrated it and we ended up coming to a compromise and we ended up locking cities in and it wasn't quite dovetail but we did give them 100 percent of the cities they wanted. I'd like to go to the next step because I've always believed they should be dovetailed.

ST: Lamit, what was the term you used on how these would be put together?

Glading: Date of hire or the Allegheny-Mohawk?

ST: Date of hire.

Glading: Date of hire. Meaning we'd go back to the date you were hired by your company whether it was US Air, or American or America West and that would be your seniority date and you would all be integrated in that fashion.

TAB #7

AFA President Veda Shook Letter to Chairman Jay Rockefeller

June 16, 2011

ASSOCIATION OF FLIGHT ATTENDANTS-CWA, AFL-CIO
501 Third Street, NW, Washington, DC 20001-2797
PHONE 202•434•1300 MAIN FAX 202•434•1319 LEGAL FAX 202•434•0680

June 16, 2011

Honorable Chairman Jay Rockefeller
Commerce, Science & Transportation Committee
531 Hart Senate Office Building
Washington, DC 20510

Dear Senator Rockefeller:

The Association of Flight Attendants-CWA (AFA) encourages congressional action to right a terrible wrong against Flight Attendants in the American/TWA merger. Since the time of that merger AFA advocated for a remedy and Congress took action for future mergers to ensure a fair and equitable seniority integration process is provided by law. We encourage Congress to fully resolve this issue and bring justice to former TWA Flight Attendants.

When American Airlines acquired TWA in 2001, former leadership of the union that represents American Airlines Flight Attendants made the unilateral decision to deprive the TWA Flight Attendants of their accrued occupational seniority in the class and craft. The Association of Flight Attendants has a union seniority integration policy that maintains seniority for Flight Attendants in a merger, and absent such protection for Flight Attendants we believe a fair and equitable process must be a minimum standard in any merger.

AFA supported the McCaskill/Bond amendment that ensured what happened to the TWA Flight Attendants would never again happen to another group of workers. It is wrong that the very people whose treatment necessitated a change in the law were not protected by that law. Former TWA Flight Attendants have suffered extraordinary harm from the ill-advised seniority "stapling." Flight Attendants with over 40 years of service to the airlines were suddenly out of work as furloughs affected most airlines. Many of these Flight Attendants are still out of work and waiting recall to flying at American.

The current environment of airline consolidation brings additional concern and urgency to this issue. Should American merge again, former TWA Flight Attendants will be further disadvantaged as the only group to receive no seniority integration whatsoever. We encourage swift action to rectify this situation.

We encourage Congress to take legislative action to end this injustice.

Sincerely,

Veda Shook
President

TAB # 3

TWA Flight Attendant Amy Ludwig

June 2013 Buyout Date

DEPARTURE DATE AWARDS

EMP	SEN	NAME	CURRENT BASE	AWARD
100641	201	LOYA DL	LAXD	JUN
133693	6090	LUCAS JA	JFKI	MAR
52989	5209	LUCE JR RR	IMAI	JUN
37523	525	LUCZAK AM	LAXD	MAR
627024	15389	LUDWIG AI	SLTD	JUN
362849	10950	LUDWIG S	DFWD	MAY
98243	4477	LUKAC SL	IMAI	SEP B
64119	1787	LUNDQUIST	ORDD	AUG
9700	808	LUST TH	IDFI	MAR
41810	1181	LUTES CL	JFKI	FEB
15400	317	LYMAN L	JFKI	MAR
307130	8808	LYONS C	DFWD	AUG
14928	638	LYONS CD	IORI	SEP A
356659	10452	LYONS E	DFWD	MAY
335577	10207	LYONS-KUPER	SFOD	AUG
564437	13472	LYSNE CP	SFOD	MAY
4312	626	MACAGBA EP	SFOD	JUN
655874	15677	MACDONALD DO	DFWD	AUG
447117	11630	MACDONALD DS	LGAD	MAY
564995	13677	MACH A	DCAD	SEP B
61464	1665	MACKOWN JA	IDFI	AUG
38345	1155	MACK-SCHLACHTER	JFKI	AUG
146095	6774	MADDOX CJ	IDFI	MAY
95509	2684	MADDOX JD	JFKI	SEP B
140033	6686	MAGEE TR	DFWD	MAR
647961	15396	MAGTR AD	LGAD	AUG
45258	1385	MAGGIO DG	JFKI	FEB
23443	1196	MAGUIRE EM	JFKI	SEP B
196207	8449	MAHAN DL	DFWD	SEP B
46767	4090	MAINARD SG	DFWD	SEP B
45137	1297	MALLICK KA	IORI	FEB
95100	2583	MALOOF P	LAXD	FEB
145848	6685	MANDEL S	JFKI	SEP B
182876	8145	MANIACI CA	DFWD	MAY
9334	738	MANIFOLD DL	JFKI	FEB
98242	3573	MANISCALCO CA	LGAD	JUN
196267	9877	MANLEY KC	ORDD	MAY
104756	2225	MANTEY MA	LAXD	SEP B
56718	4952	MARAS-GARDNER DC	LGAD	SEP B
67823	2288	MARBURY BA	IDFI	FEB
345532	10350	MARCOON J	LGAD	MAY
9524	191	MARCOUX AM	IORI	SEP B
63937	1982	MARCUS SA	LAXD	FEB
301449	9671	MARGOLIS E	ORDD	SEP B
5670	688	MARICLE	IDFI	AUG

TAB #9

APFA Board Vote on Resolution for Arbitrary Look-Back Distribution

APFA

BOARD OF DIRECTORS MEETING

SPECIAL BOARD OF DIRECTORS MEETING

via Teleconference
August 29, 2012

Resolution #: 2
Maker: Glading
Second: Casadey
Date: 08/29/2012
Time: 5:40 p.m.

Resolution Name: Equity Claim Distribution

☐ Affects Policy Manual

YES	= Yes	ABS	= Absetn	PXY	= Proxy Vote
NO	= No	N/A	= Absent	REC	= Recuse
PASS	= Pass				

COMMENTS

	BOS	BOS	DCA	DFW	IAD	JFK	LAX	LAX	LGA	MIA	MIA	ORD	PHX	RDU	SFO	STL	PRES — Re-Breaker
	Corrigan	Vargas	Preyon	O'Reilly	Bedwell	Alesia	Whitaker	Wilhelm	Casadey	Moyer	Troidman	Breckenridge	Alcorcher	MacPherson	Sales	Fuller	Glading
YES	☒	☐	☐	☒	☐	☐	☒	☐	☒	☒	☒	☒	☐	☒	☒	☐	☐
NO	☐	☒	☒	☐	☒	☒	☐	☒	☐	☐	☐	☐	☒	☐	☐	☒	☐
PASS	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
ABS	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
N/A	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
PXY	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
REC	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐

YES: 9 NO: 7 ABSTAIN: 0 ABSENT: 0

Status: *Passed* ☒ *Failed* ☐ *Tabled* ☐ *Withdrawn* ☐ *Show of Hands* ☐

WHEREAS, under Article III, Section 3.L(22) of the APFA Constitution, the APFA Board of Directors has the right and the responsibility to take any and all appropriate action deemed necessary by the Board and in accordance with the Constitution to promote the welfare of the members of APFA; and

WHEREAS, on November 29, 2011, American Airlines filed for bankruptcy and since then has been operating as a debtor under Chapter 11 of the Bankruptcy Code; and

TAB #10

Recall Notice

American Airlines®

REQUIRED: COMPLETE AND RETURN THIS FORM BY OCTOBER 25, 2010

October 15, 2010

Accept or Reject Reemployment Form

NAME: James Tuller

EMP#: 645480

You are hereby notified to report to American Airlines for re-employment in your former position as a Flight Attendant effective **December 17, 2010.**

This recall to work notification is in accordance with Article 16 of the Collective Bargaining Agreement between American Airlines and the Association of Professional Flight Attendants, which requires that you notify the Company of your intention to accept or reject re-employment within ten (10) days after the post mark of this letter. **This form must be completed and sent via FedEx no later than October 25, 2010** and received by the Company no later than October 27, 2010. **Failure to notify the Company of your intent to return to work, failure to report to your assigned training class, failure to complete training or failure to report to base following your completion of training will result in the forfeiture of your re-employment rights and seniority.**

X I accept the offer of reemployment to the position of Flight Attendant.

____ I do not accept this offer to return to work as a Flight Attendant with AA, and I forfeit all recall rights.

My e-mail address is: mensajun@yahoo.com (PRINT)

My telephone contact number is:

314-265-3166

According to the provisions of the AA/APFA Collective Bargaining Agreement, before a flight attendant can be recalled to a base, all transfer requests to that base must be cleared. **At this time we expect that all Flight Attendants being recalled will be based at New York - LGA. Qualified French speakers will be based Miami (MIA).**

Signature

10/20/10
Date

cc: Personnel File
Flight Service Contract Administration

TAB # 11

2001 Seniority Integration Agreement

Date 12/19/2001 Date 12-20-01

AGREEMENT ON SENIORITY INTEGRATION
AND RELATED MATTERS
Between
AMERICAN AIRLINES, INC.
And
ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS
Representing
THE FLIGHT ATTENDANTS OF AMERICAN AIRLINES, INC.

This Agreement on Seniority Integration and Related Matters (hereinafter referred to as "this Agreement") is made and entered into in accordance with the provisions of the Railway Labor Act, as amended, by and between American Airlines, Inc. (hereinafter sometimes referred to as "American" or "AA"), and the Association of Professional Flight Attendants (hereinafter sometimes referred to as "APFA"), as representative of Flight Attendants in the employ of American Airlines.

American and APFA recognize that it is in their mutual interest to achieve the integration of American and TWA-LLC, an affiliate of American, into a single competitive transportation entity, and, after negotiations, have agreed to the following provisions.

I. General

A. As long as APFA is not the bargaining representative of the flight attendants employed by TWA Airlines LLC (hereinafter referred to as "TWA-LLC"), nothing in this Agreement is intended to change the terms and conditions of employment at TWA-LLC, absent concurrence of the TWA-LLC flight attendants' bargaining representative.

B. Effective upon the date that APFA becomes the bargaining representative of the flight attendants employed by or performing flight attendant services for TWA-LLC, the terms and conditions of the current AA-APFA collective bargaining agreement (hereinafter referred to as "the CBA") shall be fully applicable to such flight attendants, except as otherwise provided for in this Agreement, or in any applicable subsequent agreement between AA and APFA.

II. Definitions

A. The term "American Airlines-APFA collective bargaining agreement" (or "the CBA") refers to the Agreement between American and APFA, including all Supplements, Appendices and Letters of Agreement, that were effective on September 12, 2001 or that became effective subsequent to September 12, 2001.

B. The terms "American Airlines Flight Attendants" and "AA Flight Attendants" are used interchangeably herein and, as used herein, shall include all flight attendants whose names appear on the American Airlines Flight Attendant System Seniority List.

Date 12/11/01 Date [illegible]

C. The term "TWA-LLC Flight Attendants," as used herein, shall mean those Flight Attendants in the service of TWA-LLC whose names appear on the TWA-LLC flight attendant System Seniority List on or after April 10, 2001.

D. The term "Single Transportation System Declaration," shall refer to the date on which TWA-LLC and American are declared to be a single transportation system for labor relations purposes by the National Mediation Board.

E. The term "TWA-LLC Occupational Seniority Date," shall refer to the on line (bidding) seniority date at TWA-LLC of a flight attendant, which in no event shall be an earlier date than the bidding seniority date that such flight attendant had at TWA on April 9, 2001.

F. The term "TWA," shall refer to the air carrier predecessor to TWA-LLC.

III. Seniority

A. The TWA-LLC Flight Attendants shall receive an occupational seniority date at American of April 10, 2001, except that any TWA-LLC Flight Attendant who did not complete training and commence line flying on or before April 9, 2001, shall receive as an occupational seniority at American date 12/11/01 [the date on which this Agreement is signed], or such later date on which the flight attendant is placed on TWA-LLC's payroll on flight attendant status.

B. APFA agrees that, consistent with American's previously stated position, the TWA-LLC Flight Attendants shall receive credit at American for their years of service at TWA and TWA-LLC for purposes of determining their Classification seniority and Company seniority dates at American, provided that in no event shall either of these seniority dates be earlier than they were at TWA as of April 9, 2001.

C. AA Flight Attendants shall maintain their existing AA occupational, classification and Company seniority dates, except as otherwise provided for in this Agreement.

IV. Terms and Conditions Determined Through a Bid and Award Process

Except as otherwise provided in this Agreement, AA occupational seniority shall be applicable for all purposes for which occupational seniority is applicable under the CBA.

V. Combined Seniority List

A. APFA shall establish a combined system seniority list utilizing the occupational seniority dates as set forth in paragraph III of this Agreement and shall provide the list to AA. For purposes of the placement of the TWA-LLC flight attendants on the combined seniority list, the relative placement of the TWA-LLC flight attendants to each other shall not be altered. This list shall be implemented by AA effective the earlier of: (1) the first day of the calendar month

Date 4/11/01 Date 4/11/01

immediately following the date on which the first TWA LLC flight attendant works in an inflight cabin position at American; or (2) December 31, 2002.

B. AA shall make available (in hard copy or on the internet in a format that can be downloaded and printed) a copy of the combined seniority list to all flight attendants on the combined list.

C. Upon implementation of the combined seniority list, the occupational seniority dates included in the list shall be used for all purposes for which occupational seniority is applicable under the AA-APFA collective bargaining agreement, except as otherwise provided in this Agreement. This shall include, among other things, the order of furlough (which shall be by inverse system seniority order) and recall (which shall be by system seniority order among the flight attendants on furlough at the time of a recall). Upon implementation of the combined seniority list, AA will assure that any flight attendants on furlough will be the junior most flight attendants, by occupational seniority date, on the combined seniority list.

D. In the event there are any vacancies at AA or TWA-LLC prior to implementation of a combined seniority list, they will be filled by AA and/or TWA-LLC flight attendants on furlough status prior to any hiring of new flight attendants.

VI. Seniority at St. Louis Flight Attendant Bases

A flight attendant who was employed by TWA as a flight attendant as of April 9, 2001, and who was continuously employed by or conducting flights for TWA-LLC and based at a TWA-LLC base from April 10, 2001 until the Single Transportation System Declaration, and who thereafter remains continuously based at a St. Louis base will be permitted to use her/his TWA-LLC occupational seniority date at a St. Louis base for bidding purposes determined by occupational seniority.

VII. Limitations on TWA-LLC Operations

A. TWA-LLC Flight Service Operations will terminate no later than January 1, 2006, with the sole exception that aircraft maintained under the TWA-LLC maintenance certificate may continue to operate beyond this date.

B. No new fleet types may be entered into service in the TWA-LLC Operation. Aircraft may be replaced in TWA-LLC on a one-for-one basis with any other aircraft type in the TWA-LLC fleet (e.g., a B717 can be replaced with a B757).

C. No new flight attendant base may be created by TWA-LLC or to conduct flight operations at TWA-LLC.

D. During the existence of TWA-LLC Operations, each of the following shall apply:

1. The number of flight attendants based at St. Louis International may not exceed 11.29% of the combined number of flight attendants based at AA's ORD and DFW bases.

Date 12/19/01 Date 12-17-01

2. The number of flight attendants based at St. Louis Domestic may not exceed 52.14% of the combined number of flight attendants based at AA's ORD and DFW bases.

3. AA will be considered to be in compliance with the limitations set forth in paragraphs VII.D.1. and/or VII.D.2. if the percentage of flight attendants based at the particular base (St. Louis International or St. Louis Domestic) does not exceed the specified percentage limitation by more than 3% (e.g., if the percentage of flight attendants based at St. Louis Domestic does not exceed 55.14% of the combined number of flight attendants based at AA's ORD and DFW bases).

VIII. Movement Between American and TWA-LLC During the Existence of TWA-LLC Operations Following Implementation of A Combined Seniority List

A. An AA flight attendant may transfer/proffer to fill a vacancy in and fly trips assigned to a St. Louis domicile in accordance with the provisions for transfer/proffer provided in the CBA in the event the opening has been offered for bidding by TWA-LLC flight attendants based at St. Louis Domestic who meet the criteria set forth in paragraph VI. of this Agreement and a vacancy remains after honoring the bids properly submitted by such TWA-LLC flight attendants. An AA flight attendant who transfers to a St. Louis base will be able to use her/his AA occupational seniority at such base for all purposes for which occupational seniority is applicable under the CBA.

B. A flight attendant who is able to use her/his TWA-LLC occupational seniority date as set forth in paragraph VI. may transfer/proffer to fill a vacancy in and fly trips assigned to an AA base at a location other than at St. Louis in accordance with the provisions for transfer/proffer provided in the CBA, utilizing the flight attendant's AA occupational seniority as provided under paragraph III of this Agreement, in the event the opening has been offered for bidding by all AA flight attendants and there are no AA flight attendants on furlough status.

1. Following transfer by a TWA-LLC flight attendant from a St. Louis base to an AA base at a location other than at St. Louis in accordance with paragraph VIII.B., the TWA-LLC flight attendant's AA occupational seniority, as provided under paragraph III of this Agreement, shall be applicable for all purposes for which occupational seniority applies under the AA-APFA collective bargaining agreement, except as provided in paragraph VIII.B.2.

2. The following terms will apply to a TWA-LLC flight attendant who transfers during the existence of TWA-LLC operations to an AA base at a location other than St. Louis and who thereafter during the existence of TWA-LLC operations transfers/proffers to fill a vacancy in and fly trips at a St. Louis base.

a. If the first such transfer/proffer back from an AA base to St. Louis has an effective date that is within two years following the effective date of the initial transfer from St. Louis to the AA base, the flight attendant will be able to use her/his TWA-LLC occupational seniority date for such transfer/proffer and at the St. Louis base for bidding purposes determined by occupational seniority as long as the flight attendant thereafter remains based at St. Louis.

Date 9/19/01 Date 11 OCT 01

provided that this exception to paragraphs VIII.A. and VII.B. and B.1. shall not apply during any period of time in which any AA flight attendants are on furlough status.

b. If the first transfer back to a St. Louis base does not have an effective date that is within two years following the effective date of the initial transfer from St. Louis to the AA base, the flight attendant will not be able to use her/his TWA-LLC occupational seniority rights for any purposes, including for transfer/proffer to a St. Louis base or for bidding purposes at a St. Louis base.

c. If, by application of paragraph VIII.B.2., the flight attendant is able to again use her/his TWA-LLC occupational seniority following an initial transfer back to a St. Louis base, the flight attendant will only be able to continue to use her/his TWA-LLC occupational seniority so long as she/he continues to be based at St. Louis.

IX. Furlough Length Of Service and Pay Adjustments

The occupational seniority of all American Airlines flight attendants furloughed on or after April 10, 2001 shall be adjusted to fully credit any periods of time while the flight attendants are or were on furlough status at American Airlines on or after April 10, 2001 if, and to the same extent, that any TWA-LLC flight attendants are credited for occupational seniority for any periods of furlough on or after April 10, 2001.

X. Additional Transition Matters

Additional transition matters will be the subject of subsequent agreement between AA and APFA.

XI. Remedies

A. Any dispute between APFA and American alleging a violation of this Agreement that has not been resolved by agreement between the President of the APFA and the Vice President of Employee Relations, or their designees, within fifteen (15) days following the date the grievance is provided to the other party, shall immediately thereafter be submitted to the American Airlines Flight Attendant System Board of Adjustment sitting with a neutral arbitrator and arbitrated on an expedited basis.

B. The System Board shall render a decision within ninety (90) days following submission of the dispute to the System Board.

C. The System Board shall retain jurisdiction over any remedial issues related to the dispute submitted to the System Board.

D. To the extent not inconsistent with this paragraph X of this Agreement, the procedures provided in Article 29 of the CBA will be applicable to such disputes.

Date 12/17/01 Date 12-17-01

Agreed to this 12/17/01 day of

AMERICAN AIRLINES, INC.

By:

ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS

By: 12-17-01

TAB #12

Department of Labor Letter to APFA, Election Removal

This is a copy of the U.S. Department of Labor's final notice to APFA calling for action on the removal of John Ward as President following the DOL's investigation, subsequent findings, and resulting ballot count of ballots submitted by APFA members in good standing that were originally discounted.

John Ward received previous DOL notifications warning of this issue but chose to conceal their existence from the Board, thereby putting APFA in jeopardy of even more legal action, this time by the U.S. Department of Labor.

The DOL demanded the rightful winner of the election be installed as President. The APFA Board of Directors were made aware of this letter and wholly complied with the orders of the Department of Labor. John Ward was removed from office on August 25, 2004.

Below, the last two, and the most important, paragraphs have been enlarged for easier reading.

Department of Labor

Employment Standards Administration
Office of Labor-Management Standards
Washington, DC 20210

August 17, 2004

John Ward, President
Association of Professional Flight Attendants
1004 W. Euless Blvd.
Euless, TX 76040

Dear Mr. Ward:

Pursuant to the authority of Section 601 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), and consent of certain complaints, the Office of Labor-Management Standards (OLMS) conducted an investigation of the March 12, 2004, runoff election for officers of the Association of Professional Flight Attendants (APFA).

On July 13, 2004, OLMS District Director Dennis Perring notified you of the OLMS investigative findings and the concerns filed by Sherry Cooper and Tommie Hutto-Blake. Specifically, OLMS concluded that 26 eligible members were denied the right to vote in violation of Section 401(e) of the LMRDA when their ballots were not counted in the March 12, 2004 runoff election.

Since the margin of victory for President was 3 votes, OLMS concluded that we were unable to count the 26 ballots may have affected the outcome of the March 12, 2004 runoff election for president. On August 12, 2004, OLMS opened and counted the 26 challenged ballots in the presence of candidate observers. When OLMS added the 26 votes to the March 12, 2004 tally, the revised election data showed that candidate Tommie Hutto-Blake received 2 more votes than candidate John Ward.

With regard to the election complaints filed by Ted Bidwell, Joan Jamison, and Linda Lemming, the OLMS investigation found no evidence that may have affected the runoff election outcome. In the near future, OLMS will issue its statement of reasons for dismissing these complaints and provide a copy to APFA.

Based on these additional findings, it is the OLMS position that APFA should immediately install candidate Tommie Hutto-Blake to the position of APFA President. APFA's voluntary installation of Ms. Hutto-Blake to president for the remainder of the term will remedy the violations of Section 401(e) that occurred during the runoff election.

OLMS understands that the APFA Board of Directors is convening on August 25. We, therefore, request that any information concerning action contemplated by APFA to recognize the results of the August 12 ballot count, or otherwise address these findings, be provided to this office on or before August 26. OLMS will defer a final decision on enforcement until that time so that we may consider APFA's response. If OLMS does not receive a response from APFA by August 26, the Department will refer this matter for enforcement proceedings.

We appreciate the Union's continued cooperation in this matter.

Thank you.

Sincerely,

John H. Heiser
Chief, Division of Enforcement

cc: Susan Hoppe, APFA Counsel
Greg Hullinet, APFA Secretary

Based on these additional findings, it is the OLMS position that APFA should immediately install candidate Tommie Hutto-Blake to the position of APFA President. APFA's voluntary installation of Ms. Hutto-Blake to president for the remainder of the term will remedy the violations of Section 401(e) that occurred during the runoff election.

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TAB #13

APFA Constitution, Exempting "Furloughed" Employees from Dues

July 2009

Article II - Membership

SECTION 1. ELIGIBILITY FOR MEMBERSHIP:

Any person hired as a Flight Attendant by an airline where the APFA is the recognized Bargaining Agency for the Flight Attendant employee group at that airline shall be eligible to join and maintain membership in the APFA as hereinafter provided.

SECTION 2. OBLIGATIONS OF MEMBERS:

Members of the Association do accept and agree to abide by this Constitution of the APFA as it is in force or as it may be altered, added to, deleted from or amended in accordance with the provisions of this Constitution. Ignorance of this Constitution will not be considered a proper excuse for any violation of the provisions contained herein. Inherent in the rights, privileges, duties and responsibilities of membership in the APFA is the obligation to responsibly exercise these rights, privileges, duties and responsibilities.

SECTION 3. BILL OF RIGHTS OF MEMBERS:

A.All members of the APFA shall have the right of free speech, freedom of assembly and freedom to dissent.

B.All members of the APFA shall have access to all administrative and financial reports and records except as provided in Section 5,B,(1) of this Article II.

C.All members of the APFA shall have the right to individual privacy.

D.All members of the APFA shall have the right to due process and equal representation.

E.All members of the APFA shall have full equality of rights and shall not be discriminated against because of national origin, race, religion, creed, age, sex or sexual orientation.

SECTION 4. CLASSIFICATION OF MEMBERSHIP

– ACTIVE:

A.An Active Member is a Flight Attendant who has a dues obligation to the APFA in accordance with this Constitution, except as provided herein.

B.Membership Status– Good Standing:

(1)The rights and privileges of a member in good standing shall include, but not be limited to:

a.attending union meetings;

b.voting on all matters brought before the membership;

c.voting in elections for officers or base representatives of the APFA; and

d.running for an elected position, or holding an elected or appointed position with the APFA.

(2)A member, regardless of flight status, shall be considered in good standing and shall maintain all rights and privileges of the APFA so long as financial obligations are met pursuant to this Article II and Article IV of this Constitution.

(3)A member in good standing will remain in good standing and will be exempt from his/her financial obligation to the APFA when the member is in an unpaid status from his/her employer in excess of thirty (30) consecutive days by:

a.termination by the employer and seeking reinstatement, as provided for in the applicable Collective Bargaining Agreement or through an administrative or judicial proceeding;

b.suspension/withhold by the employer and seeking reinstatement;

c.unpaid sick status;

d.hardship as approved by the Executive Committee or by the Board of Directors;

e.approved military leave of absence; and/or

f.furlough by the employer.

TAB #14

APFA Board Resolution Changing Constitution

Making "Furloughed" Employees Dues Obligated

November 2009

APFA
FALL BOARD OF DIRECTORS MEETING
NOVEMBER 3 - 4, 2009

Y = Yes
N = No
P = Pass
A = Abstain
N/A = Absent
PXY = Proxy Vote

Resolution Tally Sheet

Resolution:	#8
Maker:	Prayon
Second:	Breckenridge
Date:	11/4/09
Time:	1235

		Y	N	p	A	N/A
BOS	McCautey	V				
BOSI	Vargas	V				
DCA	Prayon	V				
DCAI	Gale	V				
DFW	O'Kelley	7				
IDF	Bedwell	V				
JFK	Nasca	V				
LAX	Nikides	V				
LAXI	Ransom	V				
LGA	Avfles		V			
MIA	Washbisrt	V				
IMA	Traufman	V				
ORD	Breckenridge	V				
IOR	Bauer	V				
RDU1	MacPherson-Bowers	V				
SFO	Salas	V				
SFOI	Ross	V				
STL	Hunter		V			
PRES	Glading (Tie Breaker)					

STATUS: YES: 16 PASSED (V) NO: 2 FAILED ( ) ABSTAIN: TABLED( )

ABSE WITHI AWN (

WHEREAS, per Article **HI,** Section 1, the APFA Constitution may be recommended to the membership for alterations, additions, deletions, or amendments by the APFA Board of Directors; and

WHEREAS, the Board of Directors has determined that it is necessary to update the APFA Constitution, and to recommend changes to the membership; and

A

WHEREAS, Article II, Section 4.B(2) of the APFA Constitution provides that a member "shall be considered in good standing and shall maintain all rights and privileges of the APFA so long as financial obligations are met pursuant to this Article II and Article IV of this Constitution"; and

WHEREAS, Article II, Section 4.B(3) provides:

> A member in good standing will remain in good standing and will be exempt from his/her financial obligation to the APFA when the member is in an unpaid status from his/her employer in excess of thirty (30) consecutive days by:
>
> a. termination by the employer and seeking reinstatement, as provided for in the applicable Collective Bargaining Agreement or through an administrative or judicial proceeding;
> b. suspension/withhold by the employer and seeking reinstatement;
> c. unpaid sick status;
> d. hardship as approved by the Executive Committee or by the Board of Directors;
> e. approved military leave of absence; and/or
> f. furlough by the employer.

WHEREAS, Article II, Section 4.B(4) provides that: "A member in good standing who is on any leave of absence from his/her employer for reasons not listed in (3),a through 3,f above shall remain a member in good standing and shall be dues obligated, but shall not be required to pay dues on a monthly basis. Upon return to payroll, his/her dues obligation shall become payable pursuant to this Article II and Article IV of this Constitution"; and

WHEREAS, under Section 4.B(3), despite the facts that members in the listed categories are not required to pay dues, and that under Section 4.B(4) members on leaves of absence for other reasons are not required to pay dues on a monthly basis, these members continue to enjoy the full rights of APFA membership; and

WHEREAS, when these provisions were adopted in 1991, there was no contemplation that significant numbers of flight attendants would be in unpaid status; and

WHEREAS, beginning in 2002, thousands of members have been in unpaid status for at least five years; and

WHEREAS, it appears that large numbers of flight attendants may continue to be in unpaid status for many years; and

WHEREAS, APFA has an obligation to represent, and does actively represent, flight attendants who, under Article II., Section 4.B(3) and (4) are not dues obligated or who are not required to pay dues on a monthly basis; and

WHEREAS, as a result of the exemption from the dues obligation or from payment of dues on a monthly basis, APFA has lost the benefit of hundreds of thousands of dollars without any equivalent reduction in its costs of operating the union and representing these and all flight attendants; and

WHEREAS, it is a fundamental principle that members can be required to pay dues in order to exercise the rights of union membership; and

WHEREAS, it is in the best interests of APFA and our members that all members who are entitled to exercise the rights and privileges of APFA membership are obligated to be dues current as defined in Article IV of the Constitution.

THEREFORE BE IT RESOLVED, that the APFA Board of Directors recommends that the following amendments be made to Article II and Article TV of the APFA Constitution:

Article II

Delete the current language of Section 4.B(3) and replace with:
the following:

"Members who are in an unpaid status for any reason shall be dues obligated for all dues accrued on or after the effective date of this Section 4.B(3)."

Delete Section 4.B(4)

In Section 5.A, delete "except as provided in (3) below,"

Article IV

In Section 1.A, delete "Article n, Section 4,B,(3)."

Delete the first paragraph of Section 3.C and replace with the following:

Members returning from unpaid leave status may set up a payment plan to satisfy their obligation for back dues, initiation fee(s) and/or assessments.

Sections 3.C(1), (2) and (3) remain unchanged.

BE IT FURTHER RESOLVED, that these proposed Constitutional amendments be sent to the membership for approval.

- **Membership status non-Flight Attendant positions * Resolution Number 6:**
  Item #3 on your ballot

This proposal brings changes to the status of those Flight Attendants who choose to take a paid management position or other non-Flight Attendant Position at American. Currently, these individuals who have become members of management retain the right to their membership and therefore have access to Union meetings and information intended for Flight Attendants. Under this proposal, those individuals will lose their APFA membership. If they return to the position of Flight Attendant, they may rejoin the Union subject to the re-initiation fee.

Board Vote: 18 Yes 0 No

- **Monthly dues amount * Resolution Number 7:**
  Item #4 on your ballot

Under this resolution, monthly dues will be set at an amount equal to the hourly Domestic pay rate at year 12, which currently is $42.65. This figure is less than dues at most other unions and would mean currently only an increase of $1.65 per month (less than $20.00 per year, or 83 cents per pay period) over today's dues amount. Tagging the dues amount to a pay step is a smart way to effectively respond to APFA's cost of doing business. We believe this method of calculating dues will eliminate the need for any future dues referendums. When the APFA membership hourly rates change, your monthly dues will be tied to the established pay step. Twenty-five (25%) percent of any dues increase under this proposal shall be placed in a negotiations-related fund.

Board Vote: 15 Yes 3 No

- **Monthly dues obligation * Resolution Number 8:**
  Item #5 on your ballot

This proposal expands the dues obligation to all Flight Attendants in any unpaid status. APFA continues its work on your behalf even if you aren't flying. Simply put, to maintain your union rights and privileges, you need to pay dues. The categories of unpaid status are:

[redacted]
- Approved Military Leave or Absence
- Approved Hardships
- Unpaid Sick
- Suspension by Employer
- Termination by Employer
- Other Authorized Unpaid Leaves

Board Vote: 16 Yes 2 No

TAB #15

APFA Election Results, 2012

National Officers Runoff Election Results

Today, February 24, 2012, the APFA National Ballot Committee certified the results of the National Officer Run-Off election.

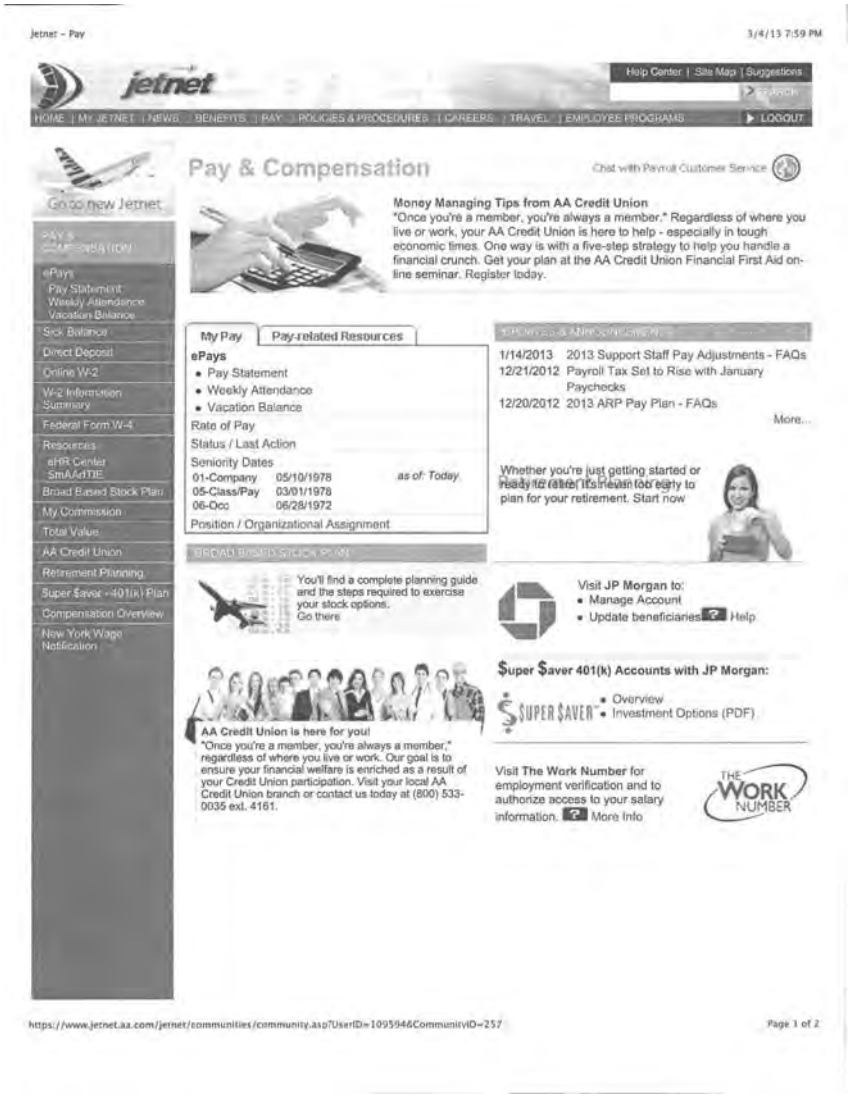
The results are as follows: For President Liz Geiss received 4284 votes and Laura Glading received 4434 votes. For Vice President Marcus Gluth received 4562 votes and Anne Loew received 4075 votes. For Secretary Vicki Dale received 4233 votes and Jeff Pharr received 4403 votes. For Treasurer Jennifer Brissette received 3711 votes and Greg Gunter received 4921 votes.

Laura Glading is elected APFA President, Marcus Gluth is elected APFA Vice President, Jeff Pharr is elected APFA Secretary and Greg Gunter is elected APFA Treasurer. These officers will serve a four year term of office beginning April 1, 2012. A document containing the base breakdown and percentages, will be posted soon on the Election and Balloting Page of APFA.org.

AFPA National Ballot Committee
APFA Communications
817.540.0108 x8308
communications@apfa.org

TAB #16

Occupational Seniority Date of Hire, 1972



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Money Managing Tips from AA Credit Union
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My Pay | Pay-related Resources

ePays
- Pay Statement
- Weekly Attendance
- Vacation Balance

Rate of Pay
Status / Last Action
Seniority Dates

01-Company	05/10/1978	as of: Today
05-Class/Pay	03/01/1978	
06-Occ	06/28/1972	

Position / Organizational Assignment

1/14/2013 2013 Support Staff Pay Adjustments - FAQs
12/21/2012 Payroll Tax Set to Rise with January Paychecks
12/20/2012 2013 ARP Pay Plan - FAQs
More...

Whether you're just getting started or ready to retire, it's never too early to plan for your retirement. Start now

BROAD BASED STOCK PLAN

You'll find a complete planning guide and the steps required to exercise your stock options.
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- Update beneficiaries ? Help

$uper $aver 401(k) Accounts with JP Morgan:
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- Investment Options (PDF)

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Visit **The Work Number** for employment verification and to authorize access to your salary information. ? More Info

https://www.jetnet.aa.com/jetnet/communities/community.asp?UserID=1095946CommunityID=257 Page 1 of 2

Prepared Statement ofPaul Hudson, President, Flyersrights.org, and Executive Director, Aviation Consumer Action Project

STATEMENT OF FLYERSRIGHTS.ORG

AND

AVIATION CONSUMER ACTION PROJECT

RE

PROPOSED USAIRWAYS-AMERICAN AIRLINES MERGER

TO

U.S. HOUSE OF REPRESENTATIVES & SENATE JUDICIARY COMMITTEES, U.S. DEPARTMENT OF TRANSPORTATION, U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION

BY

PAUL HUDSON

PRESIDENT, FLYERSRIGHTS.ORG

EXECUTIVE DIRECTOR, AVIATION CONSUMER ACTION PROJECT

March 5, 2013

The proposed merger between American Airlines and USAirways should only be approved with regulation establishing national and international standards for enforceable airline passenger rights.

Legislation that would block anti-competitive practices that are rapidly eroding price competition in the airline industry, eliminate anti-competitive airport practices, and empower airline passenger interests to balance the interests of the air transportation industry that now completely dominate national air transportation policy.

In June 2012, we submitted testimony to the US Dept. of Transportation (DOT) which set forth much needed reforms to enhance airline passenger rights. Copy enclosed.

However, the Advisory Committee for Aviation Consumer Protection appointed by Secretary LaHood (consisting of an airline representative, an airport representative, a state official and a travel writer) failed to support any of the 15+ proposals, and to date the DOT has failed to recommend any aviation consumer protection legislation although mandated to do so by Congress by February 2013.

It has also delayed issuing regulation requiring that ancillary fees be disclosed in real time to third party airline ticket sellers and web sites.

There have been recent efforts by airlines as noted in the recent testimony to the House Subcommittee on Regulatory Reform, Commercial & Antitrust Law of the Business Travel Coalition and the American Antitrust Institute to defeat price competition.

The 2011 acquisition of Airtran by Southwest Airlines is instructive. It discontinued service to Sarasota Florida (and five other medium size cities) in favor of Southwest service at Tampa (65 miles away) thereby reducing Sarasota enplanements by over 300,000 per year and raising airfares, travel time and expenses for passengers.

No other low cost carrier has come in to replace Airtran which provided real price competition for Southwest and other carriers and no other one really exists except on very limited routes (Southwest is no longer a low cost carrier by most definitions but competes largely on service, lack of baggage fees and more liberal

cancelation policies). The USAirways-American merger will certainly reduce competition further.

The record of prior airline mergers is clear that fares generally increase and service is reduced to smaller and medium size cities and concentrated at fortress hubs. See Table 1 at White Paper at American Antitrust Institute web site, 2013.

Unless stopped, the airline penchant for mergers (USAir-America West 2005, Delta-Northwest 2008, Republic-Midwest 2009, Republic-Frontier 2009, United-Continental 2010, Southwest-Airtran 2011) coupled with the lack of new entrants and the loss of most US low cost air carriers, will soon result in oligopoly or to re-regulated monopolies, with US air transportation operating more like AMTRAK.

Airline mergers also mean thousands of jobs lost, contractors often replace union workers, retirement plans are reduced or wiped out, airplanes are sold, routes are eliminated, quality of service typically plummets during costly airline merger transitions for two years or more, safety margins may be reduced, and passengers will pay more while departing executives take golden parachutes and remaining ones cash in with higher pay. American Airlines plans to cut at least 14,200 jobs and void union contracts -- the perks of Chapter 11.

Competition and even Chapter 11 bankruptcy can be great mechanisms for fostering efficient low cost air travel and are not necessarily unprofitable. USAirways is already quite profitable and seeks to be more so, while its CEO seeks to realize his dream of leading the largest US airline in history. There is little doubt American which has a very large cash reserve would also be profitable if it emerged from bankruptcy as a stand-alone company after shedding unaffordable union contracts, with creditors as its new shareholders, with a new more passenger and labor friendly management dedicated to better customer service, and perhaps with even some passenger representation on its board of directors.

Other Anti-Competitive Trends

Price competition was greatly enhanced by web sites that allowed consumers to comparison shop and make reservations and buy tickets. But now most airlines have taken away the ability to buy tickets or even make reservations by redirecting consumers to their web site and requiring re-entering of customer information, thereby bombarding the customer with ancillary fees and pitches for additional services or products.

The cost of a ticket can increase by $25 to over $100 or more, when coupled with hidden fees that are not disclosed in transparent ways on either third party or airline web sites (especially checked baggage fees).

The US DOT has the sole authority to issue and enforce regulations to prohibit "unfair or deceptive" airline practices, but it has rarely done so without the approval of the airlines.

And its record of enforcement by fines is dismal, with fines regularly reduced by 50% or more and nearly all violations settled by consent orders or findings in favor of the airline with zero fines.

Its handling of consumer complaints is even worse. It rejects 90% of complaints as not within its jurisdiction as allegedly not violating any DOT rule and merely asks the airline to respond.

It does not prohibit unfair terms in airline drafted contracts of carriage that make such contracts illusory with misleading words and that provide no practical means of enforcement for the consumer in case of violation.

It uses passenger complaints largely for statistical purposes and deceptively refers consumers to small claims courts that lack jurisdiction over airlines.
(See DOT web site, "Tell It to the Judge" publication. Airlines can at will and regularly do remove any lawsuit filed in state or local courts to US District Court where the litigation costs far exceed any potential consumer recovery, see Paul S. Hudson, Airline Passenger Tarmac Confinements and Delays, ABA Air & Space Lawyer, vol. 23, No. 2, 2010)

Tort cases against airlines are regularly dismissed by the courts under federal preemption doctrine, and if not dismissed outright, passengers generally are barred from recovery for damages unless they are physically injured or killed.
(See New York Courts to Passenger Victims of 11 Hour Tarmac Confinement: It's an Airline "Service", No Recovery Allowed Except for Physical Injury or Death, Aviation Consumer Action Project, Jan. 2013, enclosed; Air & Space Lawyer article above.)

The International Air Transport Association (IATA) and its members have recently approved a new business model requesting personal information from passengers not presently required in order to provide passengers with a "customized" price quote. This system if approved by the DOT could make price competition a thing of the past for international flights, and also raising serious new privacy concerns. Eventually such systems would allow for price fixing and setting based on how big your wallet is and how desperate or motivated you are to travel, completely contrary to the fixed, transparent pricing that replaced individually negotiated prices for most consumer goods in the early 20th Century America.

Due to the lack of low cost airlines in the US, we now support allowing selected foreign low cost carriers to fly domestic routes.

In sum, we believe this proposed merger of American and USAirways should be restructured or disapproved by the Justice Department, unless competition is clearly not reduced and passenger rights are well protected by new legislation and rulemaking.

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FlyersRights.org (fka the Coalition for an Airline Passengers' Bill of Rights) was founded in 2007 as non-profit corporation to advocate for the rights and interests of airline passengers by Kate Hanni after she was stranded on the tarmac for many hours with 10,000 others. It organized a coalition that successfully advocated for the adoption of the 3 Hour Rule adopted by the DOT in 2009 that prohibits airlines from confining passengers on the tarmac for extended periods without returning to the terminal. In 2012, a passenger rights section it supported was included in the FAA Reauthorization Act that encouraged the DOT to issue further aviation consumer protections. With over 25,000 member-supporters it is the largest airline passenger organization in the U.S. It publishes a weekly newsletter, maintains a free emergency telephone hotline 1-877-FLYERS-6 to assist airline passengers and an anonymous tips hotline. It relies on individual donations and receives no funding from government or the airline industry.

The Aviation Consumer Action Project (ACAP) was founded in 1971 as a 501 (c) (3) nonprofit corporation to act a voice for air travelers on national aviation issues, especially safety and airline passenger consumer rights. It is funded by contributions from individuals and foundation grants. It receives no funding and has no business relationships with the airline industry or any government agency.

ACAP has been a principal advocate for truth in scheduling, lost baggage and bumping compensation, medical kits on airliners, realistic emergency evacuation testing, passenger cabin air standards, smoking ban, and airline competition. It organized a coalition after 9/11 to advocate for the establishment of the TSA and much stronger aviation security.

Its activities include public education, publication of consumer guides and research reports, serving on national advisory committees (FAA Aviation Rulemaking Advisory Committee, TSA Aviation Security Advisory Committee, American Society of Heating, Refrigeration & Air Conditioning Engineers (ASHRAE) Committee on Aviation Cabin Air Quality), representation of aviation consumer and the public interest in rulemaking and litigation activities, testifying before legislative bodies and national and international commissions.

Paul Hudson has been executive director of ACAP since 1997 and president of FlyersRights.org since 2012. He is a New York attorney who has advocated for

airline passenger rights and interests in the Courts, before Congress, the Executive Branch in the public and professional media since 1989.

ATTACHMENTS

Airline Passengers Rights—What is needed now

By Paul Hudson, Executive Director, Aviation Consumer Action Project (ACAP) & Kate Hanni, Director, FlyersRights.org (fka Coalition for an Airline Passengers Bill of Rights (CAPBOR)) 6/6/12

Stranding & Flight Delays

For many decades by far the largest number of consumer complaints to the DOT has involved flight delays. Starting in 1980, each decade has seen air travel times increase and excessive flight delays become more prevalent.

The airlines generally blame air traffic control and weather, but this rings hollow when the particulars are examined. At times up to one third of flights are now delayed, and the figure is always over 10%.

Prior to the enactment of the Airline Deregulation Act of 1978 (ADA), air travel times decreased in each decade and reliability improved. Airlines were regulated by the Civil Aeronautics Board (CAB) which approved flight schedules, air fares, conditions and standards of service. The Federal Aviation Administration (FAA) controlled the number of flights at major airports which prevented congestion and operated the air traffic control system directly. Also, aircraft were placed in service each decade that were faster, more reliable, flight crews were better paid, and had arguably higher standards of training and experience. Finally, airport capacity increases and additions in the 1950s through the 1960s kept up with increased air traffic.

Since 1978, there has been no net increase in major US airports, so the skies around major cities such as New York and Chicago, whose need for an additional airport have been blocked by entrenched special interests, have become more and more congested. Deregulated airlines have discontinued the use of wide bodied jets carrying up to 500 passengers in favor of more frequent flights with narrow bodied airliners and regional jets carrying 20 to 140 passengers, thereby negating the principal strategy for increasing airport capacity. Airport authorities enjoy exemptions from most antitrust law and lack any significant representation of airline passenger consumer interests, so that they are permitted to and regularly do engage in anticompetitive behavior that drives up air travel costs and increases air travel delays and passenger inconvenience. (1)

Regulations requiring minimum reserve capacity of equipment and flight crews have been allowed to lapse. So have rules that allowed passengers on a significantly delayed or canceled flight to use their ticket on another airline's flight at no additional cost (known as Rule 240 or reciprocity rule), and as have regulations requiring other airlines to honor a bankrupt airlines tickets.

Flight delays since 1980 of over one hour have increased dramatically. This situation not only inconveniences, stresses and results in hardship for airline passengers, but also burdens airlines and the economy. The US economy depends on safe, convenient, relatively low cost air travel as the primary means of long distance transportation. (2)

Tarmac Delays and Confinements

In 2007, it was discovered and proven by CAPBOR and ACAP that stranding and involuntary confinement on the tarmac was far more prevalent than previously thought based on a few publicized incidents. It was admitted in June 2007 by the DOT Bureau of Transportation Statistics (BTS) that airlines were not reporting and BTS was not requiring them to report most long on ground delays, delays for diverted flights, cancelled flights and multiple gate return flights were "lost in space" not reported for time on the tarmac. New regulations were adopted and the first report for October 2008 showed over 50 flights (which would imply 120,000 passengers per year) were delayed on the ground over 3 hours though some analysts believe even those statistics greatly underreported these delays.

There was a strong financial incentive that the flight crews had to pull away from the gate (and not go back) even if they knew the flight is not taking off for a long time, if at all. Nearly all airlines only pay flight attendants & pilots their full wages from the time that the cabin door closes, and some pay nothing for time spent with the aircraft at the terminal gate.

ACAP, Flyers Rights (fka Coalition for a Passengers Bill of Rights (CAPBOR)), Public Citizen, Consumers Union, US PIRGs, New York and several other state governments, the Business Travel Coalition and even some former airline executives all supported a 3 hour rule to give passengers the opportunity to deplane if a flight is delayed more than 2-3 hours and to require that water, food, and sanitary facilities be provided.

The DOT in 2009 took major steps to reduce delays caused by congestion by enacting regulations that discouraged over scheduling of flight times. By enacting a version of Truth in Scheduling that ACAP had long advocated, there has been a major reduction in chronically delayed flights and virtually elimination of deceptively scheduled flights. Airlines had previously had a financial incentive to schedule take offs and landings at the most popular times at major airports far in excess of airport capacity and then blame delays on air traffic control or weather. Now they must disclose on time statistics for their flights to the public, explain to the DOT chronically late flights and eliminate deceptively scheduled flights.

Increases in flight cancellations predicted by the airlines if the 3 hour rule was enacted did not materialize, but the flight delays did decline and lengthy tarmac confinements were drastically reduced.

ACAP has long advocated **providing compensation for passengers for excessive flight delays**.

While the airlines will not admit it, cancellations for financial reasons are common and amount to breach of contract or fraud. If a flight has so few passengers that the airline wants to cancel it, it should do so at least two hours before, so that passengers do not come to the airport unnecessarily, and provide passengers with alternate transportation within an hour of the canceled flight time plus a ticket refund.

Otherwise, the airlines should provide passengers with compensation that is equivalent to normal breach of contract compensation or at least equivalent to bumping, perhaps capped at several thousand dollars. In case of any dispute, it

should be presumed that a flight was canceled for economic reasons if there was no ground hold by air traffic control and the flight was was less than 30% booked.

There is presently no meaningful compensation provided to passengers for excessive flight delays. Any action brought in state or small claims courts gets transferred to federal courts based on airline claims of federal preemption, where the cost of litigation far exceeds any potential recovery.

Most recently some airlines are redrafting their contract of carriage contracts with passengers to broaden the definition of force majeure to include things beyond weather such as maintenance or labor shortage caused delays, things that are traditionally defined as within the airline control and subject to passenger compensation.

And while passengers have flight delay compensation rights under the Montreal Convention of 1999 for international flights of up to $7,000 (see attached article at Appendix A) and also for EU travel for several times the airfare cost, there is **no requirement by DOT that passengers be informed of their delay compensation rights**, which are generally ignored or denied by the airlines.

Passengers who are **stranded by airline delays and cancellations overnight away from their home city should receive ground transportation and over night accommodations**. Airlines use to provide this a matter of course, but now many do not or do so only for certain favored passengers. This has led to chronic choke point airports like O'Hare in Chicago being dubbed "Camp O'Hare" with over 50,000 passengers per year being stranded and cots being set up in the baggage claim areas after midnight during the last high air traffic years (1998-2000).

New York City is now the number one national choke point and efforts by the federal government such as re-doing air traffic approach and take off patterns and opening up some military air space areas during holiday periods have had limited effect. Other measures such as auctioning off slots have often been blocked in court by the airlines and airport authorities.

Airlines offer **"insurance" for flight or trip cancellation *that is* deceptive** in that such policies fail to cover the overwhelming number of situations, and the coverage excludes inconvenience or consequential damages. For example, a passenger whose vacation or business trip is ruined cannot claim for that loss, and generally cannot cancel his/her trip except in situations of serious illness or death. FlyersRights.org has received complaints on their toll free hotline of next of kin providing a death certificate and airlines still not providing a refund.

As a first step, the DOT should require that the premiums for such insurance cannot be excessive as that is normally defined by state insurance regulations and that the exclusions and claims limitations must be clearly disclosed to passengers. Also anyone who offers such insurance should be required to disclose to the DOT BTS the amount of premiums collected, number of policies issued and the claims paid on an annual basis.

Lost and Mishandled Baggage complaints represent the second largest category of airline passenger complaints to the DOT.

The existing regulations have been in effect for many years but they have been administered solely by the airlines which make receiving compensation difficult and often impossible.

Over 40,000 checked bags per year are never returned to passengers, as they do not have tags that identify the passenger owner. Instead of looking inside the bags for identifying information or posting a description as a normal lost-and-found operation would do, most airlines treat the bags as abandoned property and auctioned them off with the proceeds going to the airline that lost or mishandled the baggage in the first place.

The airlines handling of lost baggage claims is scandalous with the overwhelming majority of claims being rejected and lost baggage sold after 90 days with no attempt to identify or return baggage without passenger identification on the exterior. (3)

Nearly all states use the Uniform Abandoned Property Act to deal with property that has been checked with a third party and then not returned to its owner. (At common law, unclaimed property escheated to the state.) This statute provides for the holder of the property to make attempts to locate the owner and if that is not successful to sell the property and turn over the proceeds to a state run abandoned property fund which holds the proceeds in trust in perpetuity for the true owner who may recover the proceeds upon filing a proper claim.

Airlines are not included in such state laws, but there should analogous federal regulation to require airlines to develop a computerized data base that will match airline passenger lost baggage with descriptions of contents and exterior by passengers. Any proceeds of lost baggage sold should be paid to a fund that is used for consumer protection services and/or measures to improve baggage handling.

At present, airlines have a financial incentive not to return lost luggage, due to low caps on claims, especially for international flights, and the difficulty passengers have in providing claim details that the airlines require to honor claims.

Airlines unlike the US Postal Service or private common carriers like UPS or Federal Express generally do not offer passengers insurance for valuable property that they take possession of (and increasingly charge extra fees for) and instead contrary to the common law of bailment disclaim all liability, even for negligence, and the DOT by regulation has supported this policy.

Finally, theft by airline, TSA and other baggage handlers is a known problem, one that is often covered up by thieves who rip identifying tags off bags that they have looted. Foreign airports provide airline passengers with plastic sealants for their luggage to deter thieves and damage, but US security regulations require that TSA have free and easy access to inspect the interior of checked baggage, negating such deterrent measures.

The DOT should produce a consumer report that "unbundles" mishandled baggage and reports lost, damaged and stolen items separately by airline, and a report on the claims made vs claims paid.
See
http://www.azdatapages.com/datacenter/general/airport-items-lost.html

Other Consumer Complaints against Airlines involve Reservations, Ticketing and Boarding #3, Customer Service #4, Frequent Flyer programs #5, Refunds #6, Disabilities #7, Oversales (aka Bumping) #8, Fare #9, Ads #10, Discrimination #11, and Animals #12. See Consumer Air Travel Reports, RITA/DOT web site.

Frequent Flyer programs have become an integral part of air transportation services used by air travelers for vacation travel. They are also a source of revenue for airlines which sell miles to credit card, car rental, hotel and other businesses that seek to provide customers with a low cost inducement to buy customer loyalty. The US Supreme Court has ruled that states may not regulate these programs as they do other consumer contracts, and the DOT or Congress has not yet done so. For accounting purposes frequent flyer miles represent a potential liability for the airlines. Airlines, however, take the position that these are not binding contractual obligations but merely marketing programs that can be altered or eliminated at will. As miles accumulate on the books of an airline, there is an enormous incentive for the airline to devalue them by program changes.

Most consumers however view frequent flyer programs as an important benefit, with the miles they accumulate for future travel being an obligation of the airline and an asset of theirs.

Studies show that there are radical differences in airline frequent flyer programs, with some airlines allowing as little as 5% of miles to be redeemed for travel and others nearly 100%. At the very least, airlines should be required to disclose the percentage of miles that they are redeeming, the number of seats available for frequent flyer tickets on the most popular destinations and routes, as well as other key statistics to provide transparency and way for the public to evaluate such programs.

Also, there should be requirement that airlines provide notice to their frequent flyer members of material changes in their programs at least six months in advance, so consumers can plan ahead and make travel redemption decisions and decide whether they wish to continue to favor that airline with their travel business.

Over sales or bumping involves the practice of airlines of selling more tickets for a flight than they have seats available in order to account for no shows, then either denying passengers with reservations a seat or else seeking volunteers to deplane and take a later flight with an inducement such a ticket voucher for another flight.

Bumping is regulated by DOT rules but the airlines avoided regularly telling passengers with their rights are which depending on the amount of delay can involve cash payments of several times the ticket price plus a delayed flight as well as overnight accommodations and meals. If consumers knew their rights it is likely most would not voluntarily settle for a restricted voucher. As of 2011 the airlines have to tell a "voluntary bump" what the likelihood of being bumped is, and the potential compensation they would get were they involuntarily bumped, and the same must be told to involuntary bumps. Compensation for bumping was also increased from 200-400 in 2007 to 650 and 1300.

As airlines now fill a higher proportion of their seats than ever before, over sales are increasing, however, the use of non-refundable, non-changeable or highly restricted tickets has greatly decreased the number of no shows and has allowed the airlines to profit from them.

Most recently the airlines have asked and the DOT has proposed a rule to discontinue reporting of over sales. The rule rather than being repealed should be expanded to require the percentage of oversales to be reported because there is presently no limit and so many passengers are being bumped as they tighten capacity and it is very hard to predict whether or not passengers with reservations on increasingly full flights will get a seat.

Enforcement, Remedies and Advocacy

Finally, **airline passengers need to include a way for passengers to enforce their rights in a timely and inexpensive way**. Flyersrights.org has asked that complaints get a response in 24 hours and a resolution within 3 weeks. At present, weak guidelines normally require an acknowledgement within 30 days with no time limit on resolution.

The present system is totally lacking in accountability and transparency. Complaints to airlines or the US DOT are generally ignored and compensation claims rejected. The DOT Consumer Protection office does not use best practices in handling the airline passenger complaints it does receive, i.e. requiring the airline to respond by a date certain, sharing its responses and communications with the passenger, or advising the passenger of his/her rights and the DOTs action or lack thereof to the complaint. Most complaints have generally only been logged for statistical purposes.

ACAP suggests mandating a small claims arbitration process for unresolved consumer claims (which could be an online private alternate dispute resolution service that uses retired judges, consumer affairs, or experienced arbitrators) where arbitration groups or arbitrators are approved by state or local attorneys general or consumer protection agencies and/or the use of local small claims courts which now handle the vast bulk of consumer claims against businesses. For disputes involving many passengers, and millions of dollars, class actions in state or federal courts should be authorized, as well as through arbitration.

There also needs to be a provision that would require the airline to pay attorneys fees of the passenger if the resulting decision exceeds a rejected settlement offer. Now, there is no arbitration process, airlines who are sued in state courts try to get the cases dismissed on jurisdictional grounds and normally have the cases removed from local and state courts to federal district court. The expense of federal litigation and most state court litigation far exceeds any potential recovery.

Other models of federal – state consumer protection laws that have been effective include the federal Lemon Law, which resolved the legal logjams and technical defenses long used by auto companies to frustrate consumer claims of involving defective autos for non-injury claims.

Clarify Airline Deregulation Legislation to eliminate the judicially mandated exemption of airlines from state consumer protection laws that apply to virtually all other industries and the de facto exemption of airlines for passenger common law

tort suits in most federal circuits. This can be done by legislation and/or by the DOT in its rulemaking and by formal opinions of counsel and by the Secretary.

The deregulation act was meant to prevent states from re-regulating the airlines as to scheduling, fares, and services. However, airline attorneys have successfully used some vague and ambiguous language in that 1978 legislation to claim exemption (often called preemption) from any accountability for passenger abuse in state and federal courts (the argument being that only the DOT/FAA can regulate airlines, and if they do not ban a practice it is permitted even if in violation of basic common law rights that have long been the province of state law). See attached article Reasonable Regulation Trumps Laissez Faire, by Paul S. Hudson, Air & Space Lawyer, Fall, 2010.

An **Airline Passenger Emergency Hotline** is sorely needed for passengers faced with stranding and other emergencies. The DOT "hotline" as currently configured is little more than a vehicle to gather complaint statistics. A caller receives a recorded message, and response time is usually over 10 days. Follow-up is spotty to non-existent. There is no known intervention that occurs on a real time basis. And the DOT reportedly has 75 persons assigned to its "airline consumer" unit. The DOT is wasteful and ineffective with taxpayer funding for this purpose.

The Coalition for an Airline Passengers' Bill of Rights (CAPBOR aka Flyersrights.org) has a hotline staffed with volunteers established over the past 18 months and has received thousands of calls. But it is overwhelmed and without funding is unlikely to survive.

Given the nature of the federal bureaucracy, it would be waste of time and money for this to continue even with some reform. Rather the DOT should be required to contract with one or two non-profit aviation consumer organizations to provide a true airline passenger hotline for about half the funds now devoted to the DOT's ineffective hotline. Such hotlines are frequently funded with government grants in other issue areas.

Airline Passenger Groups have received no funding from DOT for many decades while airline and airport industry groups receive indirect funding from billions of dollars of federal grants made to the industry and paid for by airline passenger ticket taxes that can be as high as 30%. **A portion of the ticket tax paid by passengers needs to be used to fund the passenger groups** that actually represent passengers, most of whom cannot afford paid lobbyists or even the expense of attending advisory committee meetings on safety, security and other national aviation issue areas.

An amount as low as a penny on every ticket would provide $6 to $10 million annually. This fund should be distributed largely on a formula basis with DOT oversight rather than on a discretionary grant basis, and passengers should be able to designate from a list of certified organizations which one(s) that they wish to have their consumer ticket tax sent to. This is similar to the methods used by United Way, federal and state funds for various causes such as wildlife protection, for utility consumer protection, and for promotion of certain agricultural products.

ACAP closed its Washington DC office in 2003 due to lack of funding and presently no aviation consumer group has a staffed office in Washington DC. The Airline Passenger Association discontinued operations some years ago. The International

Airline Passenger Association with an office in Dallas has cut back its operations and is actually for profit vendor of travel services to frequent airline passengers. Others who purport to speak for airline passengers are travel agents or industry consultants or media commentators often with close business ties to the airline industry and who cannot afford to offend and usually defend the industry, while purporting to speak for airline passenger interests. The national media has also cut back on air travel reporting and several important trade publications have been discontinued. Only FlyersRights.org , ACAP and some air crash organizations specialize in aviation consumer rights and are not conflicted.

Without funding, the voice of the airline passenger will be heard weakly if at all in Washington DC, their interests largely ignored, and the industry will continue to dominate and control air transportation policy and those officials who make the decisions. The national air transportation system is likely to continue to degrade due to gridlock among industry interests, coupled with the anti-consumer attitudes of much of the airline industry and the lack of robust consumer or public interest advocacy on national air transportation issues.

Aviation Security complaints
largely against the Transportation Security Administration (TSA) at approximately 10,000 per year now nearly equal consumer complaints against airlines. The leading complaints involve rudeness by TSA personnel and property complaints. There are also widely publicized concerns of personal privacy invasions by body searches and health risks involving X-ray screening of passengers. And there is a significant problem of theft crime and potential corruption within the TSA, that must also be addressed. (4)

The Aviation Security Advisory Committee was inactive from 2007 and has only recently been reactivated. A proper advisory committee with representatives of passenger, aviation terrorist victims, public health, as well as privacy advocates should be actively used by the TSA and the Dept. of Homeland Security to advise and to have oversight of passenger complaints and meet on a quarterly basis. Previous to 2007, this committee consisted of representatives of the air travel industry, federal agencies concerned with security, several aviation consumer organizations and a terrorist victims group. No members were from academia or the makers of aviation security equipment and services.

Aviation Safety is regulated by the FAA within the Department of Transportation. The only advisory committee with a public or passenger representatives is the FAA Aviation Rulemaking Advisory Committee (ARAC) which is dominated by industry representatives. Its Occupant Safety Issue Group and Subcommittee as well as other subcommittees involving passenger safety have been inactive for over 10 years, as the FAA has instead relied on all industry Advisory Rulemaking Committees (ARCs) with no passenger representatives that it dubiously claims are exempt from the public representation requirements of the Federal Advisory Committee Act and from the Open Meetings Law.

Conclusion

The above provisions would cover the largest number of complaints of airline passengers, which are Flight Delays and Cancellations and Lost or

Mishandled Luggage. Airline Passenger Safety and Security issues may be outside purview of the DOT Consumer Protection Committee but if so should be addressed by ad hoc advisory committees appointed by the Secretary of Homeland Security and the Secretary of Transportation with timely reporting requirements to the Administration and the Congress.

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END NOTES

(1) **Examples of monopolistic anti-consumer behaviors** include - a) removal of car rental facilities from airports in favor of remote off-premise centers funded by additional taxes on car rentals increasing airline passenger expenses, travel time and inconvenience (the freed up space is then used for parking; parking fees represent about 60% of airport revenue and are the major source of airport revenue growth); b) provisions in airport bond indenture agreements and gate leases that restrict airline competition and airport capacity increases at airports; c) monopolistic contracts with airport vendors and ground transportation companies; d) restricting or shutting down area airports to prevent competition with favored airports that are cash cows and patronage wells for local politicians and their supporters; e) enforcing higher air fares for local travelers to and from hub airports to subsidize through travelers.

(2) **Flight delays cost $32.9 billion, passengers foot half the bill**
By Ann Brody Guy, College of Natural Resources | October 18, 2010
University of California at Berkeley.

The cost of domestic flight delays puts a $32.9 billion dent into the U.S. economy, and about half that cost is borne by airline passengers, according to a new study led by researchers at the University of California, Berkeley.

The research was commissioned by the Federal Aviation Administration (FAA), and the final report was delivered to the agency today (Monday, Oct. 18).

Direct cost of air transportation delay in 2007

Cost Component	**Cost (in billions)**
Costs to Airlines	$8.3
Costs to Passengers	$16.7
Costs from Lost Demand	$3.9
Total Direct Cost	$28.9
Impact on GDP	$4.0
Total Cost	**$32.9**

See http://newscenter.berkeley.edu/2010/10/18/flight_delays/ for the full text of the study.

(3) Only 6% of all baggage claims are ever paid, and normally claims are rejected the first time they are presented. Passengers are NOT given information on how to file a claim at airports or TSA Checkpoints either. The airlines claim they hold baggage for 90 days but there is no regulation requiring they do so, and they sell baggage for about $3.00 per pound to a company in Alabama called "unclaimedbaggage.com". Airlines reject passengers requests to come find their bags in the warehouses where they claim they store them for 90 days preventing any kind of recovery on the part of passengers

(4) TSA houses a "Crime Database" that has vast information on "mishandled baggage" in airports at TSA checkpoints. Narcotic medications are being stolen at record rates as are iPADS and other electronics not covered by the airlines contract of carriage, therefore in carryon baggage. However, this data base has now been taken down from the TSA web site and is no longer available to the public. Apparently TSA does not want the public to know the extent of its crime problem.

Organizational Statement

The Aviation Consumer Action Project (ACAP) is a nonprofit corporation founded in 1971 which acts as voice for air travelers on national issues of aviation safety, security, and consumer rights. Its publications include Facts & Advice for Airline Passengers (a pocket handbook for air travelers). ACAP has been involved in rulemaking before the FAA and most particularly bumping, baggage compensation, medical kits on airliners, airline security, and air quality.

Paul Hudson is a New York attorney and has been executive director since 1997. He represents ACAP as a member of the FAA Advisory Rulemaking Committee (ARAC), Executive Committee and the Transportation Security Administration (TSA) Aviation Security Advisory Committee (ASAC) (1997-2006). ACAP has also been an active member of the ASHRAE Advisory Committee on Aviation Air Quality Standards.

ACAP intervened in a class action case on behalf of Northwest Airline passengers who were stranded in a snow storm in Detroit for many hours in 1999, the last major case involving stranded passengers; and was successful in achieving more thorough notices and robust compensation payments for several thousand passengers involved. ACAP filed amicus briefs and argued against the Air Transport Assn. position in defense of a 2007 New York anti-stranding law that was ruled invalid by the Second Circuit Court of Appeals based on federal preemption arguments.

KATE HANNI, DIRECTOR, FLYERSRIGHTS.ORG

Kate Hanni is one today's most passionate and dedicated national figures fighting for safeguards and protections to airline passengers. She is the Founder & Executive Director of FlyersRights.org, formerly the Coalition for Airline Passengers' Bill of Rights (CAPBOR), the fastest growing airline passengers' coalition in the country.

Kate, her family and thousands of airline passengers were stranded on the tarmacs of airports all over the country aboard 124 American Airlines flights during the Christmas holidays, December 29th, 2006. For close to ten hours, Kate and the rest of the passengers were given no food, no water, no medical attention and no basic services such as working toilettes. Unable to deplane and sitting on the tarmac at Austin airport, Kate and other passengers decided to turn anger and frustration into advocacy by creating the Coalition for an Airline Passenger Bill of Rights (CAPBOR), now known as FlyersRights.org (FRO).

FRO has grown from 100 members to more than 50,000, and is supported by many consumer groups, pilots and flight attendants. Since June 2007, FRO has operated a 24 hour **HOTLINE** (1-877-flyers-6) for airline passengers to report their experiences. During the first day of operation, the Hotline received more than 920 calls from angry and frustrated passengers in less than 3 ½ hours.

Kate has taken her mission on behalf of the flying public to the national airwaves. In all, Kate has completed more than 5,700 interviews since 2007. And FRO/CAPBOR has filed numerous comments on DOT rulemaking and legislation that have led to significant pro-consumer regulations and legislation including:

- October 2008 tarmac data mandate; airlines must report tarmac data for cancelled, diverted and multiple gate return flights

- May 2008 bumping compensation doubled from 200 and 400 dollars respectively to 400 and 800 dollars
- December 21 2009, the three hour tarmac rule for domestic flights
- August 23, 2011 the 4 hour tarmac rule for international flight
- August 23 2011 refunds of baggage fees for lost baggage
- August 23 2011 another increase in bumping compensation to 650 and 1300 dollars respectively
- January 23th 2012
    - Ban on post purchase price fare increase
    - Ability to hold a ticket for 24 hours without a re-faring fee
    - Full Fare advertising : All fare advertising must include base fare plus any mandatory taxes, surcharges and booking fees
    - Mandatory notification of flight delays every 30 minutes by any means possible, airport overhead announcements, overhead displays, e-mail, phone, text etc.
    - In addition airlines are now required to disclose baggage fees online and or on the phone when making a reservation and they must make clear where all ancillary fee information can be found prior to booking a ticket.

In Five years FlyersRights.org had Fifteen Bills introduced before Congress, all titled "Airline Passengers Bill of Rights", with both the House and Senate having passed their versions of the bills. The FAA Reauthorization Bill passed in February of 2012 contained an Airline Passengers Bill of Rights.

FlyersRights.org and its leader Kate Hanni's list of honors is long and growing-

- Named one of the top 25 most influential people by Nielson Business Meetings In April of 2007
- Named in 33 Most Influential in Travel by Travel Weekly on Nov. 20, 2007
- Among Forbes Magazine's 25 Most Influential Women in Travel in 2008
- A Conde Nast Traveler Trailblazer in 2008
- Named one of Travel Weekly's 33 Most Influential Names in Travel in 2010

APPENDIX A

Airline Passenger Compensation Rights on International Flights

Paul S. Hudson, Esq.
Aviation Consumer Action Project
PO Box 19029, Washington, DC 20036
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International airline passengers, under the Montreal Convention of 1999 ratified by the U.S. in 2003 (and which replaced the Warsaw Convention), now have legal rights that are in some ways superior to the rights of passengers on U.S. domestic flights. International air travel covered by this treaty includes any ticketed trip with stopping, departure or destination points in two or more countries. These rights include:

1) **Strict liability for bodily injury or death** incurred on board the aircraft or in the course of embarking or disembarking, **up to approximately $160,000** in compensation. A passenger does not have to prove negligence or fault by the airline. However, damages may be reduced for contributory negligence or wrongful acts by the passenger.

For damages over $160,000, an airline may use the defense that it was not negligent or did not engage in wrongful conduct, or the damages were solely due to negligence or wrongful acts of a third party.

2) **For lost or damaged or delayed baggage**, the airline liability is generally limited **to $1,640 per passenger**, unless the passenger has handed the airline a special interest declaration and paid any supplementary fee.

3) **Airlines are liable for** damages caused by **delay** in the transporting **of passengers** or cargo **up to $6,640**, unless the airline proves that it took all reasonable measures to

prevent the damage caused by delay or that it was impossible for them to take such measures.

No airline is permitted by contract to assert lower liability limits for international air travel than those provided for in the Montreal Convention and any such contract terms are void. In general, state common law tort or statutory actions are now preempted, as most courts now view the Montreal Convention as the exclusive remedy for claims arising out of international air transportation.

Time Limits

Legal actions on all claims must be brought within two (2) years of the incident. However, in addition, complaints to the airline for baggage damage claims must be made within 7 days, for cargo damage within 14 days of the date of receipt by the passenger. For baggage or cargo delay claims, the passenger must file a complaint with the airline within 21 days of receipt. Complaint to the airline must be made in writing and delivered or sent within the time limits or the claim is barred except in case of fraud by the airline.

Jurisdiction

Courts that have jurisdiction for passenger actions against airlines under the Montreal Convention include US federal district courts and other courts where the passenger has his/her primary and permanent residence, where the airline is domiciled (incorporated) or has its principal office, the final destination location of the flight, or where the airline has a place of business through which the ticket was purchased.

This short article is for informational purposes only and does not constitute legal advice. Anyone seeking legal advice should consult with an attorney of their choice. The text of the Montreal Convention is available on the internet at http://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/doc.html The US dollar amounts specified in this article are based on the conversion to US dollars from the Special Drawing Rights units used in the Convention as of February 22, 2008. This conversion is posted daily on the International Monetary Fund web site.

NEW YORK COURTS TO PASSENGER VICTIMS OF 11 HOUR TARMAC CONFINEMENT:

IT'S AN AIRLINE "SERVICE", NO RECOVERY ALLOWED EXCEPT FOR PHYSICAL INJURY OR DEATH

New York City, January 21, 2013

Three New York based courts have ruled that even though US DOT rules now prohibit as an unfair and deceptive practice holding airline passengers more than 3 hours on the tarmac and require that they be provided with basic sustenance after 2 hours, passengers held for 7 to 11 hours cannot sue for damages, unless they were physically injured.

Prior to enactment of the DOT Three Hour Rule in 2009, which was proposed and advocated for mainly by FlyersRights.org and a coalition it formed in 2007, up to 250,000 were being held on the tarmac for over 3 hours for reasons of commercial convenience by airlines.
www.msnbc.msn.com/id/35766268/ns/travel-rob_lovitt_columns
www.faa.gov/documentLibrary/media/Notice/N7110.524.pdf

In *Biscone v JetBlue Airways Corporation*, a midlevel appeal court for Brooklyn, Queens and Long Island on December 26, 2012 upheld a lower court decision dismissing a complaint by the plaintiff and about 1,300 others who were held for 11 hours on the tarmac at JFK Airport on Valentine's Day 2007, with inadequate food, water, bathroom facilities or breathable air. The court found this was an airline "service" immune from lawsuits, even though the plaintiff alleged that the confinement was based on knowing, repeated false statements motivated by pecuniary gain for the airline and its employees: i.e. that the flight was about to take off and the confinement was weather related. A passenger who demanded to exit the aircraft was loudly threatened with 20 years imprisonment under the Patriot Act by the flight crew. These courts accepted the airline argument that in enacting the Airline Deregulation Act of 1978 which deregulated air fares and scheduling and prohibited state re-regulation, Congress also intended to bar all tort lawsuits such as false imprisonment, fraud or infliction of emotional distress where an airline's conduct relates to its operations, unless the passenger was injured. See
www.courts.state.ny.us/Reporter/3dseries/2012/2012_09019.htm

Jetblue's CEO and founder David Neeleman, who has been named as a witness in the Biscone case, publicly apologized profusely for the snafu and admitted the airline did a "horrible job" in not deplaning its passengers as other airlines had done that day. Within a month he had lost his position as CEO. www.cnbc.com/id/17165981/JetBlue_CEO_Tells_CNBC_We_Didn...

usatoday30.usatoday.com/travel/flights/2007-05-10-jetblue...

In *Joseph v JetBlue* a US District in upstate New York reached a similar conclusion in a case involving a 7 hour confinement in October 2011 in Hartford Connecticut.
lawyersusaonline.com/wp-files/pdfs-4/joseph-v-jetblue.pdf

The Plaintiff passenger Katharine Biscone, a New York City comedy writer and television performer, has appealed to the New York Court of Appeals, the state's highest court. Her attorney Paul Hudson noted that in similar circumstances no other appeal court and nearly all other lower courts have refused to dismiss complaints involving extended tarmac confinements based on federal preemption grounds, and that another federal court had previously declined to dismiss her case and remanded it to state court finding there was no federal jurisdiction.
www.leagle.com/xmlResult.aspx?xmldoc=In%20FDCO...

Ms Biscone also appealed another order of the court which held that by filing a lawsuit in New York, she had waived all rights to personal privacy of her medical records, psychological records and tax returns which the court found could be disseminated without the restrictions provided for in commonly used confidentiality protective orders for electronically filed cases.

In a previous case involving 7,000 passengers trapped on the tarmac by Northwest Airlines passengers in Detroit in 1999 for 3 to 9 hours received, settlements paid passengers up to several thousand dollars each. In another recent case involving Continental Airlines and ExpressJet, a DOT consent order a required compensation to passengers.
abcnews.go.com/Business/story?id=88807&page=1

www.dot.gov/briefing-room/us...tarmac-delay-rule-violations

For more information contact: Aviation Consumer Action Project acapaviation@yahoo.com 800-662-1923

Response to Questions for the Record from Stephen L. Johnson, Executive Vice President, Corporate and Government Affairs, US Airways, Inc.

Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing on
"Competition and Bankruptcy in the Airline Industry: The Proposed Merger of American Airlines and US Airways."
February 26, 2013

Questions for the Record

Questions from Subcommittee Member George Holding for Mr. Johnson

1. **Should the American Airlines and US Airways merger be approved, would the flight from the Raleigh-Durham Airport to the London Heathrow Airport be cut?**

As Gary Kennedy noted at the hearing, American Airlines has proudly operated the Raleigh-Durham to London Heathrow service for years. If the merger is approved, our intent is to retain service to all the cities we serve today independently, and hopefully expand service to additional cities.

2. **Should the merger be approved, will there be any plans to expand international flights out of the Raleigh-Durham Airport?**

At the hearing, I testified that we are always looking at new opportunities to expand our domestic and international service so long as demand for new service is strong and the service is cost effective. It is too early in the merger process to evaluate new international service at Raleigh-Durham International Airport, specifically. But, we anticipate that the merger will generally create exciting opportunities for additional international service. We will keep in touch with you as those decisions are made in the future.

3. **What are the top three factors, in order of importance, that you consider when making ticket pricing decisions?**

As I mentioned at the hearing, several factors may be considered when making pricing decisions. These factors include the demand for the service, the cost of providing the service, opportunities for expanding the network feed over a hub, service quality, and supply for the service. It is difficult for me to say with certainty whether any of these factors are more important than others given the variables involved.

As described more fully in my written statement, we believe the transaction will result in a more attractive network that will lead to more service to more destinations in an intensely competitive marketplace. As a result, the merger will be good for competition , consumers, and choice.

a. If whether or not you have a competitor for a certain route is not one of the top three factors affecting pricing decisions, what role does it play? How important is it in making these decisions?

As mentioned, several factors may be considered when making pricing decisions. These factors include the demand for the service, the cost of providing the service, opportunities for expanding the network feed over a hub, service quality, and supply for the service. It is difficult for me to say with any certainty whether any of these factors are more important than others given the variables involved. Some of these factors, such as supply and demand considerations, can relate to current and potential future competitive alternatives.

As indicated more fully in my written statement, we believe the transaction will result in a more attractive network that will lead to more service to more destinations in an intensely competitive marketplace. As a result, the merger will be good for competition , consumers, and choice.

Question from Subcommittee Member Hank Johnson for Mr. Johnson

Good morning, Mr. Johnson, and thank you for testifying on this timely issue. I am interested in the effects of this merger on nnion and non-nnion employees. You have indicated in your submitted testimony that the combination of these airlines will "generate substantial net synergies and establish the financial foundation for a more stable company and better opportunities for our 100,000 employees." However, current and former employees may also be concerned about how the merger will affect benefits, such as their healthcare benefits or pensions.

1. How does the merger affect the benefits of current and former employees?

Support for this merger from our employees is unprecedented. The greater financial stability of the combined company will provide significant benefits to our employees including better pay and benefits and a path to compensation that is equal to that of their counterparts at Delta and United; more jobs and greatly improved job security; and better opportunities for advancement. The strong support of all of our employees and their unions is powerful evidence of the cooperation that led to this merger.

2. Will these benefits change over time?

We expect employee benefits to improve over time. We believe that is a strong reason for the broad employee support for this merger.

3. Consolidating airlines is usually followed by some job losses due to closures of small hubs. Another witness has suggested that greater efficiency or "net

synergies" really means job losses. Are these efficiencies simply the result of closing hubs and eliminating jobs?

No. Quite the contrary, we expect to maintain all of our current hubs, and we do not expect any job losses at the operational level. We do expect some job losses at the headquarters level as we combine those functions. Eliminating redundant headquarters functions accounts for part of the synergies involved in this transaction.

4. Are employees of these regional carriers at risk of losing their jobs?

We expect no job losses at the operational level and we expect to maintain all of our partnerships with regional carriers. We do expect some job losses at the headquarters level as we eliminate the redundancy of those functions.

Response to Questions for the Record from Gary F. Kennedy, Senior Vice President, General Counsel and Chief Compliance Officer, American Airlines

Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing on
"Competition and Bankruptcy in the Airline Industry: The Proposed Merger of American Airlines and US Airways."
February 26, 2013

Questions for the Record

Questions from Subcommittee Member George Holding for Mr. Kennedy

1. Should the American Airlines and US Airways merger be approved, would the flight from the Raleigh-Durham Airport to the London Heathrow Airport be cut?

2. Should the merger be approved, will there be any plans to expand international flights out of the Raleigh-Durham Airport?

   Response of Mr. Kennedy:

   We have not yet put together a consolidated route plan with US Airways, so I cannot tell you what might happen in any one particular city or on any one route. I can say that Raleigh-Durham is a vibrant and important market to American, and I don't see that changing. As Steve and I explained in our testimony before the Committee, a merged American would be in a stronger position to serve more destinations with greater frequencies than either of us can provide on our own. As we look at the new opportunities created by a merger, I would expect our route planners would consider Raleigh-Durham for new or improved service, but those decisions will have to be made based on a complete review of the market, which we have not yet done.

   As for our London flight, American has operated that route for many years. That route is somewhat unusual in that it does not depart from one of hubs or larger transatlantic gateways. Despite that fact, we serve that route because it is valued by our customers, and the new American will want to serve those same customers. However, as I said at the beginning, we've not yet made these types of route specific plans.

3. What are the top three factors, in order of importance that you consider when making ticket pricing decisions?

   a. If whether or not you have a competitor for a certain route is **not** one of the top three factors affecting pricing decisions, what role does it play? How important is it in making these decisions?

   Response of Mr. Kennedy:

   The top three factors that we examine are: (1) demand as evidenced by route performance and booking trends; (2) the capacity of all carriers available in the market; and (3) the

fares and quality of competitive service as well as the potential for new competitive entry, including by low cost carriers. As in other industries, ultimately our fares are determined by supply and demand in the market. Unlike other industries, we cannot hold onto unsold inventory. Any unsold airline seats are lost when the airplane departs, giving us a strong incentive to sell as many seats as possible at the price needed to sell them. In attempting to maximize the revenue produced on every flight, we constantly monitor the number of unsold seats, the opportunities to sell those seats to either connecting or local passengers, as well as the fares being charged by competitors on either direct or connecting routings that could be used by customers to reach the same destination. We have such competition on every route that we serve.

Response to Questions for the Record from Christopher L. Sagers, James A. Thomas Distinguished Professor of Law, Cleveland State University

Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing on
"Competition and Bankruptcy in the Airline Industry: The Proposed Merger of American Airlines and US Airways."
February 26, 2013

Questions for the Record

Questions from Subcommittee Ranking Member Steve Cohen for Professor Sagers

Sagers' Responses Provided April 17, 2013

I would like to begin with a clarification. Some questions imply or quote language from me implying that the enforcement agencies might bear blame for the current state of affairs in antitrust law. I do not personally blame the agencies for anything. While I dislike the current state of substantive antitrust and the level of public and private enforcement, I lay essentially all blame with the federal judiciary, and in particular the Supreme Court, as they have modified and restricted antitrust during the past forty years.

1. What is your response to Mr. Winston's suggestion that an American-US Airways merger would preserve a number of positive long run trends, including that carrier "competition would continue to be intense and low-cost carriers would continue to put downward pressure on fares" and that "entry and exit would continue to be fluid in airline markets" where the merged company exited some routes and entered others?

First, there is a serious inconsistency in Dr. Winston's views. He believes that this and perhaps subsequent network airline mergers should be permitted because carriers must reach a certain comprehensiveness in their networks for efficient operation. But as a major part of his written and live testimony, he argued that the U.S. should lower barriers to foreign competition. He therefore implies that the market is sufficiently concentrated to permit the exercise of market power by existing rivals, and needs the discipline of price challenge by foreign entrants. Aside from his idea's political infeasibility, his argument acknowledges that there *is* profitable market power in U.S. markets, which would only increase with the proposed merger, and that entry by existing U.S. firms is not so "fluid" and "intense" that it can sufficiently constrain prices. Otherwise, it wouldn't make any difference whether there is foreign competition.

In any case, I do not understand how passenger air competition can be characterized as "intense" or how challenge through LCC entry can be expected to seriously discipline network carrier market power. These claims are at odds with

the empirical evidence. It is uncontroversial that network carriers enjoy "hub premiums" at hubs where they can maintain routes with substantial concentration. LCC competition has apparently sometimes had some constraining effect on prices even at hubs, but the only LCC ever shown consistently, meaningfully to discipline hub premiums was Southwest Airlines, a phenomenon known as the "Southwest effect." With Southwest's growth into a nationwide network carrier in its own right, it can no longer be expected to serve as a disruptive maverick.[1]

2. Should DOJ redefine the relevant market in its reviews of airline industry transactions so as to take a more holistic look at competition in the national airline industry as opposed to just looking at city pairs?

There is reason to believe the agencies are already taking "national" effects more seriously, even as to markets that have traditionally been defined locally. I think they should continue to do so, and that network airline mergers would be an appropriate context for it.

At some point, competitive concerns must arise over increasing national concentration, even in sectors where the relevant antitrust markets remain local.[2] For example, it may very well be that the price competitiveness of passenger air markets still depends mainly on the conditions of a given city-pair, and yet increasing national concentration affects those competitive conditions. The more concentrated the industry is at the national level, and the more potential points at which they face one another or might do so, the less incentive that network carriers will have to challenge one another at their points of respective market power. And it may be that only national competitors can meaningfully challenge one another. In a world in which network carriers are so concentrated nationally that they will no longer challenge one another, and LCCs cannot offer meaningful price discipline because they would face overwhelming predatory response, the markets affected might remain quite local for antitrust purposes, and yet their competitiveness would be affected by national effects.

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[1] **Southwest now has significant pockets of market power and a nationwide presence of its own. That being the case, simple, widely accepted oligopoly theory suggests that it is no longer rational for Southwest to act disruptively. Oligopolists are more profitable when they do not aggressively compete with one another.**

[2] **In antitrust, courts analyze challenged transactions by first defining the "relevant markets" in which they occur. Courts ask how many firms there are that are geographically close enough to a defendant, and offer products similar enough to the defendant's products, that they could provide a competitive constraint on the defendant's ability to raise price or otherwise harm consumers.**

In passenger air transport, markets have traditionally been defined locally—each pair of cities served by an airline is typically defined as its own individual market. An airline that doesn't face local competition on a given city-pair can usually undertake fairly significant price increases on that route, because consumers in most cases would have to go prohibitively far to find a lower-priced alternative.

In principle at least, DOJ does not disagree, as one can see from its complaint in a transaction that it successfully opposed last year: the proposed merger of AT&T and T-Mobile. In prior wireless mergers, DOJ had defined markets locally. But in the challenged AT&T/T-Mobile transaction, the government spoke of local markets and of national effects, noting that the four "national" competitors priced and advertised on a national basis.

3. To what degree should DOJ be required to consider the actual impacts on competition of previous mergers in gauging the purported competitive effects of a proposed merger?

Both agencies should do so. DOJ should measure the effects on airfares after previous mergers, and should also ask whether the predicted efficiencies occurred. Both agencies do in fact engage in a substantial amount of this kind of analysis, and doing so has been among their major contributions throughout their history. DOJ in particular has studied airline markets, internally and in public conferences and reports.[3]

4. How relevant is it, or should it be, to the DOJ's merger review analysis that it has already allowed several somewhat similar mergers to take place? Should this create a presumption in favor of allowing the American-US Airways merger to proceed?

As a a matter of black letter law the approval of prior transactions is not relevant and as a matter of policy it should not be. It should not create any presumption.

1. ***Whether This Deal Is Actually So Similar***

First, in a significant and legally relevant respect, this transaction is not actually similar to previous network airline mergers, despite the parties' argument. This transaction is from five major competitors to four, leaving only three network carriers to discipline the merged entity. Previous transactions at least left larger numbers of independent networks to compete. The same must eventually become true in any series of transactions in an already concentrated oligopoly. A series of discrete mergers of similar size and similar regional overlaps at some point can no longer be said to be really "similar," because at some point the cumulative effect of the overall reduction in numbers is qualitatively different.

2. ***The Basic Doctrinal Issue, and the Role of "Fairness"***

In any case, any similarity to prior mergers is legally irrelevant as a matter of law and longstanding American tradition, and it would be bad policy were it otherwise. (A) First, the language of Clayton Act § 7 and the Hart-Scott-Rodino

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[3] *See, e.g.,* **http://www.justice.gov/atr/public/workshops/airlines2008/agenda.html.**

Act is silent as to past transactions. The only substantive question under these laws is whether "the effect of [an] acquisition may be substantially to lessen competition, or to tend to create a monopoly."[4] Moreover, by longstanding American tradition with roots in English law, the government enjoys "prosecutorial discretion" to choose which cases to pursue. A defendant cannot challenge the executive's choice to pursue him and not some other person, even though their circumstances may be the same. So, for example, a person accused of a crime cannot challenge the prosecutor's failure to accuse another person who committed the same acts; the courts will simply not consider it. While the handling of a case by the *courts* can create binding precedent for subsequent cases, the executive's decision not to prosecute one defendant is literally irrelevant to its decision to prosecute another.

(B) Second, for one obvious reason, it would be bad policy were the law to require government forebearance in a given case because it already forebore in a similar one. In the case of mergers in already concentrated industries, each subsequent merger—while it may be superficially similar to the last—makes the sector more concentrated. If there is some rule, based in fairness, that like mergers must be treated alike, then apparently once the government approved one merger it would have to stand by while the market moves toward anticompetitive oligopoly or monopoly. Of course they don't quite say as much out loud, but the parties to this merger seem to imply just that.

3. *The Asserted "Competitive Disadvantage"*

Finally, some Committee Members suggested a separate argument: that if this merger is blocked by DOJ, it would leave American Airlines and U.S. Airways at competitive disadvantage against the other network carriers. That is just as unpersuasive as the carriers' general argument that the merger will be procompetitive. First, Messrs. Kennedy and Johnson claimed at length, along with Dr. Winston, that the LCCs already provide "intense" competition, and that passenger air markets are now highly competitive because of the presence of the LCCs. But how could that be, if a comprehensive network is needed to compete? They also stressed the importance of competition from Southwest. But Southwest grew rapidly during the decades since deregulation from a comparatively small LCC with no comprehensive network, into a nationwide network carrier rivaling the legacy carriers themselves in size and comprehensiveness. It did so despite never having merged with any large, existing network. (Southwest has engaged in acquisitions, but only of other LCCs.) How did it do so, if one must have a network as large as one's opponent in order to challenge it? Finally, Messrs. Johnson and Kennedy acknowledged on the record, under questioning by Representative Conyers, that if the merger is blocked, both airlines would go forward and prosper. But how so, if they are at such a disadvantage?

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[4] **Clayton Act § 7, codified at 15 U.S.C. § 18.**

As I testified and have tried to show in these answers, the merger is better explained as an effort to shore up existing power and acquire more of it, than to develop procompetitive efficiencies.

5. Is the airline industry already sufficiently concentrated such that the purported benefits of consolidating the industry no longer outweigh its costs to competition and consumer welfare?

There is no real proof that consolidations have produced any benefits in the industry. Again, I think their purpose has been to shore up and increase market power on dominated routes. The harm to competition and consumer welfare, by contrast, is well demonstrated by the empirical evidence. So, yes, if there ever were socially desirable benefits from network carrier consolidation, they surely by now have been overwhelmed by consumer injury.

6. Given that prior mergers in the airline industry do not appear to have helped the resulting firms avoid financial difficulties, are mergers really an effective response to industry bankruptcies and financial instability?

While merging parties *always* claim that their deal will produce "synergies," some purportedly synergistic cost savings here will be reduced service and employee layoffs. Reducing capacity (and laying off workers no longer needed because of it) is precisely what firms with market power do so that they can raise their prices. To at least some extent, the "synergies" of the deal will be just a the effort of an oligopolist to reap the rewards of increased market power.

But whatever the parties' responses may be to those specific criticisms, I believe they cannot avoid the historical record. No legacy airline has consistently performed well for any long period since deregulation, notwithstanding a long series of mergers each of which was allegedly needed to improve financial performance.

The carriers' claim is false.

7. Should the authority to grant antitrust immunity for airline alliances be taken from DOT and given to DOJ, as was the case with the authority to review airline mergers?

Yes. Sector-specific regulators have commonly been more susceptible to industry capture in the enforcement of competition values than are the antitrust agencies. Based on its history since airline deregulation, I believe that that has at least sometimes characterized DOT.

This is why few sectors now enjoy merger approval by a sector-specific regulator, even though that once characterized many regulated industries. Sector-specific merger review survives in only four industries, and by bi-partisan

consensus, those four remaining loopholes should be closed.[5] The same should be no less true of DOT's power to approve airline alliances.

8. Mr. Kennedy states that "it is clear that this merger does not create a high degree of concentration." What is your response?

Airline markets are already pervasively concentrated, and network carriers hold very significant pricing power at hubs. This merger will worsen matters in two ways. First, individual routes will become yet more concentrated (even the parties acknowledge that 12 routes represent "overlaps" between them, and as I testified, their assessment of the amount of competitive "overlap" between them is unrealistically low). Second, whatever incentive they may currently have to challenge one another or other network carriers on those routes where they currently hold market power will be even further diminished by further consolidation.

9. You note that many observers have suggested that legacy carriers "have engaged in selective predatory pricing attacks to exclude entrants from city-pair routes where they enjoy dominance . . . ." Should DOJ take a more aggressive stance in opposing such conduct than it has in the past?

I wish that DOJ could, but the fault is emphatically not with the agencies. DOJ to its great credit brought a major predation challenge in the early 2000s, which happened to involve not only an airline but one of the presently merging parties. In *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003), the government challenged episodes of price predation by American Airlines during the 1990s against LCCs on routes between its hub at Dallas-Fort Worth and four smaller western cities. (Routes between hubs and small cities are ordinarily more concentrated and therefore more profitable for the dominant carrier. Protecting that profitability would be a plausible motive for American to attack LCC entrants through predation.) In each case, American succeeded in driving out the would-be entrant through bouts of undisputedly drastic price cuts. The DOJ team—which is to say, some of the best antitrust lawyers and economists in the United States—mounted a large, fact-intensive campaign based on American's own internal accounting data to show that the capacity American added to these routes to support its price cuts cost more than the revenues they added. But DOJ lost, because the court demanded a level of precision in its proof that was probably just not possible.[6]

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[5] *See, e.g.*, ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 341-42 (2007).

[6] **To simplify a complex story, courts define "predation" as pricing below cost with the goal of destroying competitors—that is, pricing at an actual loss to the predator itself. In *AMR*, DOJ argued that such pricing could be shown where American added new flights on a given route facing LCC entry, but earned revenue from those flights insufficient to cover the additional costs of adding them. While**

The case was doomed by the same obstacle that now dooms essentially all predatory pricing claims—literally no predation case has enjoyed more than marginal courtroom success in 20 years. That obstacle is the exceedingly difficult legal test set up in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). There the Court demanded that predation plaintiffs prove both (1) price below cost, and (2) a reasonable chance that the predator will be able to recoup the losses of its price war once the victim exits. Possibly even more important was the Court's emphatic discussion of its view that price predation is extremely unlikely, which did failed to acknowledge that the economic community is actually much less convinced of that view than is the Court. Essentially all cases now fail on one or both of these requirements, and *AMR* lost on the government's ability to prove price below cost.

Given DOJ's experience in the *AMR* case, and Congress's acquiescence in a standard under *Brooke Group* that has doomed every predation case brought since *Brooke Group* was decided, can anyone blame DOJ for not bringing more predation cases?

10. Why do you think the "antitrust agencies and the courts lack any resolve to actually stop major mergers?" Is there anything Congress can do to change this situation? Should Congress try to change this situation?

Again, I meant no criticism of the agencies. Moreover I have no personal knowledge of how the agencies have made their judgments as to any particular merger, and I believe that law enforcement decisions are hard to analyze from the outside. But often they apparently do lack resolve and I believe it is because the law, as formulated by the federal courts, has come to be so heavily stacked against them.

Congress should try to change the situation. Congress's last substantive modification of the standard under which mergers are judged was more than 60 years ago, in the Celler-Kefauver Amendment to Clayton Act § 7.[7] That statute—like each of the several other substantive modifications Congress has made to merger law over its long life—was meant to make merger law more aggressive, and to reverse judicial obstruction to it.[8] And yet, in more recent times, the federal

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the court apparently agreed with that argument in principle, it dismissed the suit because the government could not, with surgical precision, show that each of the costs it included in its measure of costs was truly attributable only to the increased capacity, and not to fixed overhead or other costs not incurred solely because of the added capacity. But concededly, American itself could not have done that, even with its own data.

[7] Pub. L. No. 81-899, 64 Stat. 1125 (1950).

[8] Every time Congress has amended merger law in substance, it has done so to reverse judicial opinions that limited it. Clayton Act § 7, adopted in 1914, was itself a reaction to the judiciary's refusal to use the Sherman Act to actively block

courts have once again issued a long series of opinions restricting Congress's merger policy. Above all, the most important consequence of the Celler-Kefauver Amendment, reinvigoration of the so-called "incipiency standard" of merger review, has been essentially repealed in whole by the courts, with no indication from Congress that they should do so.[9]

Solutions Congress might consider could vary quite a lot, and no doubt would be politically controversial. However, substantive merger law is now hugely weakened, and is invoked to block only the largest or most controversial mergers. Accordingly, despite having a merger law in place for nearly a century, and devoting massive resources to it, our antitrust has been helpless even to slow the series of merger "waves" that have become relatively frequent in recent decades, each one larger than the last,[10] and all in spite of increasingly persuasive evidence that mergers can be anticompetitive,[11] and, on average, produce no net social benefits.[12]

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mergers. The Celler-Kefauver Amendment of 1950 likewise reversed a number of adverse judicial opinions, which would have restricted the original § 7 to stock acquisitions, and to only those acquisitions limiting competition between the parties to the acquisition. Finally, the Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96–349, 94 Stat. 1154, § 6(a) (1980), reversed Supreme Court decisions that drastically limited the reach of § 7. (Namely the Court had held § 7 to reach only persons engaged "*in* interstate commerce," which the Court defined to require transactions that actually crossed state lines; that would describe a much smaller scope of conduct than is reached under Congress's general "interstate commerce" jurisdiction, all of which § 7 is now understood to reach. The 1980 amendment also made § 7 apply to all "persons," and not just "corporations").

[9] Even the original Clayton Act, which sought to prevent transactions that merely "tend" towards monopoly, was read to reach competitive harms that were only "incipient." But prior to about 1960, that goal was honored by the courts mainly in the breach. The first major interpretations of the Celler-Kefauver Amendment, however, found its legislative history to emphatically restate the incipiency goal, *see, e.g.,* Brown Shoe Co. v. United States, 370 U.S. 294, 318 n.32 (1962), and the caselaw thereafter became much more restrictive of mergers for roughly a decade or so.

That began to change quite radically following personnel changes on the Supreme Court in the early 1970s, and certain merger opinions issued then, and the lower courts continued the theme with ever more demanding standards for merger challenge. The state of the law at present is that, quite to the contrary of the one-time "incipiency" standard, plaintiffs now must overcome a substantial presumption *against* § 7 enforcement. They must show very large concentration numbers, very significant entry barriers or other market failures, and very compelling theories of competitive injury.

[10] *See* F.M. Scherer, *A New Retrospective on Mergers,* 28 REV. INDUS. ORG. 327, 327-29 (2006).

[11] *See, e.g.,* JOHN E. KWOKA, MERGERS AND MERGER REMEDIES IN THE UNITED STATES: A RETROSPECTIVE ANALYSIS (Cambridge: MIT Press, forthcoming 2013).

[12] *See, e.g.,* DAVID J. RAVENSCRAFT & F.M. SCHERER, MERGERS, SELL-OFFS AND ECONOMIC EFFICIENCY (Washington: Brookings Inst. 1987); Richard E. Caves, *Mergers, Takeovers, and Economic Efficiency,* 7 J. INDUS. ORG. 151 (1989) (surveying empirical literature).Klaus Gugler et al., *The Effects of Mergers: An International Comparison,* 21 INT'L J. INDUS. ORG. 625 (2003) (reporting results of massive economic study); Dennis C. Mueller, *Merger Policy in the United States: A Reconsideration,* 12 REV. INDUS. ORG. 655 (1997) (surveying empirical literature).

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